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IN THE
Supreme Court of the United States

October Term, 1985

FRANK ROA, JR., YVONNE JEAN ROA,
INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR
FRANK JOSEPH ROA,
APPELLANTS

v.

LODI MEDICAL GROUP, INC., GORDON B.
ROGET, M.D., LODI COMMUNITY HOSPITAL,
APPELLEES

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

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Questions Presented

I. Under *Buckley* v. *Valeo* and *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, may a state legislature dictate to medical malpractice plaintiffs the proportion of their damage awards that those plaintiffs may spend on legal advocacy to persuade a court to impose liability?

II. Under *Brotherhood of Railroad Trainmen* v. *Virginia Bar* and *United Mine Workers* v. *Illinois Bar*, may a state effectively deny both the right to counsel of one's choice and the right to petition the courts to that group of malpractice plaintiffs whose claims, however meritorious, are so complex that *only* contingency fees at proscribed levels would be sufficient to offset the high risks associated with their litigation?

III. Does *Walters* v. *Nat. Assn. of Radiation Survivors* mean that *all* legislative restrictions on how much plaintiffs may allocate to legal advocacy — even in purely private, highly adversarial litigation — are subject only to the most minimal sort of rationality review?

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II. By drastically restricting the percentage levels of contingency fees that malpractice plaintiffs may offer attorneys in order to offset the high risks associated with even the most meritorious claims, Section 6146 effectively denies a large category of plaintiffs access to both legal counsel and the courts of law, in violation of those plaintiffs' right to petition for redress of grievances. 16

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JURISDICTIONAL STATEMENT

Opinions Below

The decision of the Supreme Court of California, dated February 7, 1985, from which this appeal is taken, is reported at 37 Cal.3d 920, 211 Cal.Rptr. 77 (1985), and is reprinted as Appendix A. The order of the Supreme Court of California modifying the earlier opinion and denying appellants' petition for rehearing, dated May 8, 1985, is reprinted as Appendix B. The order of the Superior Court for San Joaquin County issued on December 7, 1979, approving the settlement and applying California Business and Professions Code Section 6146 over appellants' objections, is reprinted in relevant part as Appendix C.

Jurisdiction

Appellants brought this action for recovery of damages resulting from the professional malpractice of the appellees and reached a settlement. The Superior Court of California in and for the County of San Joaquin approved the compromise of the minor's claim, but denied appellants' motion to approve the payment of attorneys' fees in excess of those allowed under California law, and upheld Section 6146 over appellants' constitutional challenges. See Appendix C. On appeal, the California Supreme Court upheld Section 6146 over appellants' arguments that it infringed their rights, under the First and Fourteenth Amendments to the United States Constitution, to freedom of speech and to petition for redress. See Appendix A. Rehearing was denied on May 8, 1985. See Appendix B. Appellants filed a timely Notice of Appeal to this Court in the Supreme Court of California on July 12, 1985. See Appendix D. Because the California Supreme Court's judgment upheld a state statute over federal constitutional challenges, this Court has jurisdiction of this appeal under 28 U.S.C. Section 1257(2).[1]

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

[1] In accord with Supreme Court Rule 28.4(c), appellants note that 28 U.S.C. Section 2403(b) may be applicable.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 6146 of the California Business and Professions Code is reprinted as Appendix E.

Statement of the Case

At issue in this case is the validity of a state law that effectively denies injured plaintiffs access to counsel and a day in court. Section 6146 of the California Business and Professions Code imposes severe limits on the percentage of any damage award that a malpractice plaintiff may agree to pay to his attorney, while leaving the defendant tortfeasors entirely free of regulation and further exempting from its preclusive effects those plaintiffs who are rich enough to pay their attorneys by other means. The statute impairs the court access of non-affluent injured individuals by drastically restricting the contingency fees which are the only means available to such malpractice plaintiffs to retain counsel.

The relevant facts are not in dispute. This medical malpractice action was brought by appellants Frank Roa, Jr., and Yvonne Jean Roa, for themselves and as guardian ad litem for their infant son, Frank Joseph Roa, to recover for injuries suffered from the defendants' negligent treatment and care during the child's birth. After engaging in discovery, the plaintiffs negotiated a settlement of their claims with two of the defendants, Dr. Gordon B. Roget and the Lodi Medical Group,

Inc. The agreement provided for payment of $495,000 to the child and $5,000 to the parents. The plaintiffs sought and obtained the approval of the trial court for the terms of the settlement[2] and simultaneously petitioned the court for approval of attorneys' fees from the net recovery (App. 2a-3a).[3] Plaintiffs explained that they had retained counsel pursuant to a 25% contingency fee agreement, and that they wished their attorneys to receive 25% of their son's net recovery — approximately $122,800 — even though they were aware that Section 6146 mandated a lower maximum award (App. 3a). Section 6146[4] bars plaintiffs' attorneys, in actions for professional negligence against health care providers, from contracting for or collecting a contingency fee in excess of a statutorily prescribed schedule of percentages, which runs from 40% of the first $50,000 recovered, to just 10% of any recovery in excess

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[2] Under California Probate Code Section 3500, court approval is required for the compromise of a minor's claim for damages.

[3] Cal.Prob. Code Section 3601 provides that costs and attorneys' fees may be disbursed from the recovery obtained in settlement of a minor's claim only upon order of the court.

[4] This provision was enacted as part of California's Medical Injury Compensation Reform Act of 1975 ("MICRA"), as part of the legislative response to what was perceived by some as a malpractice insurance "crisis" in the mid-1970s. Laws similar to Section 6146 have been challenged in several other states. In *Carson* v. *Maurer*, 424 A.2d 825 (N.H. 1980), the New Hampshire Supreme Court invalidated that state's contingency fee scale for malpractice plaintiffs. Applying only an "intermediate" standard of scrutiny, the court unanimously concluded that the fee limits would "deter the litigation of legitimate causes of action, thus creating a potential impediment to injured individuals' access to courts and counsel." *Id.* at 839. Pennsylvania's contingency fee restrictions were invalidated on state constitutional grounds in *Heller* v. *Frankston*, 464 A.2d 581, 586 n.12 (Pa. 1983). The one state supreme court decision upholding a malpractice contingency fee ceiling is *Johnson* v. *St. Vincent Hospital, Inc.*, 404 N.E.2d 585 (Ind. 1980). But the Indiana limit applies only to compensation paid out of a state-administered fund, *not* to recovery made from the tortfeasors themselves. *Id.* at 602-603. No First Amendment challenges were raised in *Johnson*.

of $200,000.[5] This ceiling on attorneys' fees affects only contingency arrangements between malpractice plaintiffs and their attorneys. It sets no limits whatsoever on how much a well-to-do plaintiff may pay his counsel by other means, such as hourly wages. Nor does it impose any limit of any kind on the fees that health care providers may pay to their defense counsel. The statutory ceiling is absolute. Thus state law dictated to the Roa family that they could pay their legal advocates a contingency fee of no more than about $90,800 (App. 3a), their mutually accepted arrangement of a higher fee notwithstanding.

The trial court found that plaintiffs and their attorneys had indeed contracted for a 25% contingency fee and that the $122,800 compensation figure this percentage would yield was "a fair and reasonable amount for attorneys' fees in this case and [was] in no way disproportionate to the quality or quantity of the legal services provided to the plaintiffs in this case." (App. 3a, 51a.) The trial court also found that, but for Section 6146, the amount of attorneys' fees requested by plaintiffs would be awarded, but declined to accept plaintiffs' constitutional challenges to the statute and ordered that fees be paid in the amount of $90,800 (App. 3a-4a, 51a).

Plaintiffs appealed the fee order to the California Supreme Court, which narrowly[6] sustained Section 6146 and expressly rejected arguments that the provision operated to impair the appellants' rights, under the First and Fourteenth Amendments, to freedom of speech and to petition the courts for redress of

[5] The full scale is: 40% of the first $50,000; 33⅓% of the next $50,000; 25% of the next $100,000; 10% of any amount over $200,000. These percentages operate on the net recovery, after the deduction of litigation costs other than attorneys fees. The complete text of Section 6146 is set out in Appendix E.

[6] The decision was 4-3. Justice Kaus' opinion for the court was joined by Broussard, Grodin and Lucas, JJ. Chief Justice Bird filed a dissenting opinion, which was joined by Justice Mosk and Justice pro tem McClosky, sitting by designation.

grievances, by denying them the right to decide how much of their recovery to allocate to legal advocacy (App. 7a-8a, n.5). The court below also rejected the further contention that Section 6146 impaired prospective malpractice plaintiffs' access to effective legal representation, and therefore impaired the fundamental right of access to the courts.[7] The court subsequently denied a petition for rehearing wherein appellants again vigorously pressed their First Amendment arguments.[8]

The majority made no attempt to weigh the burden on protected expression against the state's legislative objectives, but simply noted that statutory limits on attorneys fees are "commonplace." (App. 11a.)[9] The court expressly declined to invoke the First Amendment as a basis for strict judicial scrutiny (App. 7a & n.5), and treated the provision instead as a routine business regulation that "simply places limits on the percentage of a plaintiff's recovery that an attorney may retain when he represents the plaintiff on a contingency basis." (App. 7a n.5.; *see* App. 5a.) The court relied solely on *Calhoun* v. *Massie*, 253 U.S. 170, 173-174 (1920), for the proposition that the constitutionality of contingency fee ceilings "'*has long been*

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[7] (App. 7a-8a, n.5). Plaintiffs also raised objections to Section 6146 as violating due process of law, the equal protection of the laws, and the California Constitution's requirement of separation of powers (App. 4a-5a).

[8] Upon denying the petition for rehearing, the court amended several of the footnotes in its opinion to emphasize its rejection of appellants' federal constitutional arguments (*See, e.g.*, App. 47a).

[9] In response to plaintiffs' other challenges, the court found Section 6146 to be "rationally" related to several legitimate state purposes (App. 13a, 14a). The proffered objectives were (1) the reduction of medical malpractice insurance costs (App. 12a-13a); (2) screening out unmeritorious claims (App. 13a) and reducing the "temptation to adopt improper methods of prosecution," *id.* at 15a; and (3) preserving a larger share of recovered damage awards for plaintiffs (App. 14a).

settled'" because such regulation of the legal profession falls within "'the exercise of the police power'."[10]

The Questions are Substantial

I. CALIFORNIA'S CONTINGENCY FEE LIMITATION STATUTE CONTRAVENES THE MALPRACTICE PLAINTIFF'S FIRST AMENDMENT RIGHT TO ALLOCATE RESOURCES TO PROTECTED ADVOCACY, IN VIOLATION OF THIS COURT'S DECISIONS IN *Buckley* v. *Valeo* AND *Maryland* v. *Joseph H. Munson Co.*

In *Buckley* v. *Valeo*, 424 U.S. 1, 15-23, 57 (1976), this Court squarely held that the state may not limit the amount a citizen spends on speech and petition that are protected by the First Amendment, for such limits inevitably restrict the quantity, the depth and the scope of a citizen's exercise of those fundamental rights. Thus the Court invalidated campaign expenditure ceilings because "in the free society ordained by our Constitution it is not the government, but the people . . . who must retain control over the quantity and range of debate." *Id.* at 57.

In *Village of Schaumburg* v. *Citizens for Better Environment*, 444 U.S. 620 (1980), and *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 104 S.Ct. 2839 (1984), the Court held that because "charitable appeals for funds . . . involve a variety of speech interests . . . [including] the advocacy of

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[10] (App. 6a-7a) (citation omitted) (emphasis in original). The court declined to find any impairment of the rights of speech and access to court on the express grounds that such impairment is "in large measure an empirical matter" (App. 8a) and that "the record provides no factual basis" to support a finding that anyone's freedom of expression has been curtailed (App. 8a n.5).

causes," *Schaumburg*, 444 U.S. at 632; *Munson*, 104 S.Ct. at 2849, a state may not prohibit a charitable organization "from paying or agreeing to pay as expenses more than 25% of the amount raised," *Munson*, 104 S.Ct. at 2844. Such a statutory restriction on the allocation of funds, the Court declared, lacked "due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that without such solicitation the flow of such information and advocacy would likely cease." *Schaumburg*, 444 U.S. at 632; *Munson*, 104 S.Ct. at 2849. The statute upheld by the judgment below constitutes at least as serious an invasion of First Amendment rights, for Section 6146 dictates to medical malpractice plaintiffs the percentage of any damage award they may allocate to financing the legal advocacy which produced that award.

There is no constitutional significance in the possible distinction that the law struck down in *Buckley* restricted a person's right to allocate his pre-existing assets to speech, whereas Section 6146 restricts only a person's freedom to divide the prospective recovery in a malpractice lawsuit with his lawyer.

First, the law invalidated by this Court in *Munson* similarly placed limits not on allocating pre-existing assets, but on the percentage of *expected* contributions collected by solicitation that a charitable organization could agree to pay as a fee to those who did the fundraising. More importantly, in the context of personal injury litigation the distinction between pre-existing assets and the prospective recovery of compensatory damages is illusory. If the purpose of judicially-awarded monetary compensation is to make the victim "whole" in the only way the law can, then the plaintiff must be regarded as having possessed those assets in a different form prior to his injury. Thus when a physician negligently amputates a patient's leg and is compelled by a court to pay damages for that injury, the award of money to the patient is in effect the return of assets wrongfully

converted by the tortfeasor. Since the state could not dictate to citizens the amount of their income and other assets that they may devote to litigation or political campaigning, it may not tell those same citizens how to spend the money they receive in exchange for their loss to tortfeasors of less traditional assets — such as health, limbs, and freedom from physical pain and suffering.[11]

It is beyond cavil that the right to institute a civil lawsuit in order "to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222 (1967); *see also, e.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 585-586 (1971). And this Court has long recognized that the legal advocacy involved in such litigation is itself protected speech, *NAACP* v. *Button*, 371 U.S. 415, 429, 437 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945), without regard to whether the plaintiff's cause encompasses a broad change in social policy, *see, e.g., Button, supra,* or the recovery of damages for personal injury, *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 7-8 (1964); *Mine Workers, supra,* 389 U.S. at 223.[12] Just as "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue," *Bates*

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[11] It is thus clear that the fee limitations imposed by Section 6146 on malpractice plaintiffs cannot be likened to a mere "restriction on the available resources of a claimant in government benefit proceedings." *See Walters* v. *Nat. Assn. of Radiation Survivors*, 53 U.S.L.W. 4947, 4956 n.13 (June 28, 1985).

[12] "'The grievances for redress of which the right of petition was insured . . . are not solely religious or political ones. . . .' And of course in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent that the principles announced in *Button* were applicable only to litigation for political purposes." *Id.* (citations omitted).

v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977), so a malpractice plaintiff's stake in choosing and financing the legal advocacy that seeks to recover damages for his injuries will often far exceed his interest in supporting political causes. *See also Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976).[13]

Yet this fact obscures the deeper reality that even apparently personal disputes between private parties both require and engender advocacy addressed to issues of general public importance. It is a commonplace that the law itself is on trial in every case, as well as the cause before it. This very case, while in the guise of a routine professional negligence action, raises significant systemic questions about the exercise of our fundamental rights. Even if the malpractice lawsuit brought to make a grand and eloquent statement were assumed to be rare, actions brought by injured patients with an eye toward making certain that such misfortune never befalls anyone else must be far more common.[14]

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[13] Just as those whom the suppression of commercial speech in *Virginia Bd. of Pharmacy* "hit[ ] the hardest [were] the poor, the sick, and particularly the aged," 425 U.S. at 763, so here those who suffer most from Section 6146's restriction on legal advocacy are the poor, the injured and the infirm — but here the latter two groups owe their physical suffering not to the whims of fate, but to the negligence of health care providers.

[14] For example, when malpractice plaintiffs seek punitive damages, they do so in order to make an example of the tortfeasor and to deter similar negligence throughout the profession. Tort law, of course, has as one of its functions the modification of an industry's or a profession's behavior through awards of compensatory damages, which force those groups to internalize costs and risks. *See, e.g.*, G. Calabresi, The Cost of Accidents, 26-31, 135 (1970). The standard of care within the medical profession has been affected in just this way: the rise of so-called "defensive medicine," often mentioned by doctors as one of the negative results of high-profile malpractice victories, *see, e.g.*, *AMA Special Task Force on Professional Liability and Insurance Action Plan* 4 (Feb. 1985), shows that plaintiffs have effectively communicated to physicians the need to be more careful and thorough in making diagnoses and performing treatment.

With so much more at stake than an award of damages, it follows that tort plaintiffs have a great concern with the identity, character and quality — and therefore with the compensation — of their counsel. For legal advocacy in complex malpractice cases must be undertaken not by laymen but by attorneys. In such cases, "[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). Indeed, this Court recently recognized — in the context of a medical personal injury case — a "right to representation by counsel of one's choice." *Richardson-Merrell, Inc.* v. *Koller*, 53 U.S.L.W. 4773, 4776, 4777 (June 18, 1985).[15] California may no more trench on the malpractice plaintiff's First Amendment rights by dictating the percentage of any eventual recovery the plaintiff may allocate to advocacy, than Maryland may impede free expression on the part of charitable organizations by dictating the percentage of the funds eventually collected which the charity may allocate to fundraising.

That the plaintiff's speech is channeled through a paid advocate whose services entail activities — such as discovery — that, while an integral part of the right to petition, may not in themselves constitute advocacy, is immaterial. "It is clear . . . that speech does not lose its First Amendment protection because money is spent to project it." *Virginia Bd. of Pharmacy*, *supra*, 425 U.S. at 761. The facts that "paid solicitors" were employed by charitable organizations to conduct fundraising and advocacy, and that the "expenses" of solicitation included routine overhead of no constitutional consequence, did not alter this Court's conclusions in *Schaumburg*, 444 U.S. at 635-

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[15] *See id.* at 4777 (Brennan, J., concurring) ("A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice"); *id.* at 4778 (Stevens, J., dissenting) ("Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right").

636, and *Munson*, 104 S.Ct. at 2853 n.16, that a limit on the percentage of collected funds that may be devoted to the expenses of fundraising is "a direct restriction on the *charity's* First Amendment rights." *Id.* (emphasis added). Nor was the holding in *Buckley* affected by the fact that much of the money expended in a political campaign goes to pay such surrogate speakers as door-to-door or telephone canvassers, slogan-writers and television advertisement producers, all of whose expenses include mundane administrative costs. 424 U.S. at 35-59; *see also Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 296 & n.5 (1981).[16] The vice of the statutes invalidated in those cases is identical to the flaw of Section 6146: a lack of due regard for the reality that the activity regulated is intertwined with protected speech.

Where such fundamental rights are implicated, government regulation must be justified by a compelling state interest, and "narrowly drawn . . . to serve [that] interes[t] without unnecessarily interfering with First Amendment freedoms." *Munson*, 104 S.Ct. at 2849; *Schaumburg*, 444 U.S. at 637; *see also Buckley*, *supra*, 424 U.S. at 25; *Brotherhood of Railroad Trainmen*, *supra*, 377 U.S. at 8; *Button*, *supra*, 371 U.S. at 438, 444. Yet the court below upheld Section 6146 over appellant's First Amendment challenge by deeming the provision a routine business regulation demanding only the most deferential judicial scrutiny. Although enacted as part of California's Business and Professions Code, and phrased as a prohibition upon lawyers, Section 6146 directly forbids *clients* — prospective plaintiffs — from engaging and compensating counsel on mutually acceptable terms. The remarkable assumption of the

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[16] This Court has repeatedly invoked the First Amendment to strike down laws that interfere with speech which entails the services of paid surrogates. *See, e.g., Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (advertising); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (same).

California Supreme Court that free expression is not implicated, because Section 6146 regulates only the economic relationship between two parties (App. 5a, 6a-7a), is as unavailing here as it was in *Schaumburg*, *see* 444 U.S. at 635-636, and *Munson*, 104 S.Ct. at 2853 n.16, and deserves similar repudiation by this Court.[17]

The only authority relied upon by the court below for the constitutional impregnability of Section 6146 was *Calhoun* v. *Massie*, 253 U.S. 170 (1920) (App. 6a), which upheld a contingency fee ceiling on the ground that because such regulation of the legal profession "resembl[es] in its nature the exercise of the police power," the constitutionality of such regulation "has long been settled," 253 U.S. at 173-174 (App. 6a-7a). The *Calhoun* decision is a dubious authority in the present circumstances, because it did not address a First Amendment claim and because its analysis was not informed by the dozens of major First Amendment precedents which have been handed down in the intervening 65 years. The *Calhoun* Court's reflexive deference to the police power has no place in the First Amendment context, for that amendment would "be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints. [This Court] ha[s] therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."

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[17] The advocacy for which malpractice plaintiffs contract with their attorneys seeks the vindication of legal rights. Such advocacy neither promotes the use of a product or service nor proposes a commercial transaction, and therefore does not constitute commercial speech under even the broadest definition of that less-protected variety of communication. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commn.*, 447 U.S. 557, 562 & n.5 (1980); *id.* at 579-581 (Stevens, J., concurring). *Cf. Virginia Bd. of Pharmacy*, *supra*, 425 U.S. at 761-765.

United Mine Workers, supra, 389 U.S. at 222; *see also Zauderer* v. *Office of Disciplinary Counsel*, 53 U.S.L.W. 4587, 4592 (May 28, 1985); *Munson, supra*, 104 S.Ct. at 2849.

The state purposes behind Section 6146 are wholly inadequate to meet this exacting standard of review, as is more fully developed in II., *infra*. But two of the proffered state rationales deserve particular mention here. The *only* purpose appearing on the face of the legislative package that included Section 6146 was the reduction of the allegedly "skyrocketing malpractice premium costs" in California. Cal. Stats. 1975, 2d Sess. 1975-1976, c. 2, § 12.5, p. 4007. The year after Section 6146 was enacted, this Court noted in *Buckley* that the campaign expenditure ceilings were designed to "reduc[e] the allegedly skyrocketing costs of political campaigns." 424 U.S. at 57. The Court then declared that "mere growth in the cost of federal election campaigns," *id.*, and the consequent dependence of candidates on large contributions, 424 U.S. at 55, provided no basis for governmental restrictions on the quantity of spending devoted to protected expression. *Id.* at 57. The Court should be no more dazzled by the fireworks of those who would impose a ceiling on expenditures for legal advocacy than it was by the pyrotechnics of those who sought in *Buckley* to cap campaign spending.[18]

The court below further suggested that Section 6146 was a rational means of ensuring that most of a malpractice damage award would end up in the injured plaintiff's pockets, rather than being dissipated on attorneys' fees (App. 14a). This rationale cannot make up in seeming good intentions what it lacks in constitutionality. Just as "[t]he First Amendment denies government the power to determine that spending to pro-

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[18] As Professor Paul Starr once observed, "[a] crisis can be a truly marvelous mechanism for the withdrawal or suspension of established rights." Quoted in Jenkins & Schweinfurth, "California's Medical Injury Compensation Reform Act: An Equal Protection Challenge," 52 So.Cal.L.Rev. 829, 935 (1979).

mote one's political views is wasteful, excessive or unwise," *Buckley, supra,* 424 U.S. at 57, so too it bars the state from dictating to litigants how much of a hoped-for award to allocate to the advocacy intended to win that award.[19]

The judgment below would have to be overturned in any event, for the California Supreme Court determined that the First Amendment was not even *implicated* by Section 6146, and so that court did not even bother to appraise the legislature's objectives in the light of the Speech and Petition Clause arguments urged upon it below.

The California Supreme Court's reasoning that the "adequacy of the fees permitted by the statute is in large measure an empirical matter" (App. 8a), and its consequent conclusion that plaintiff's First Amendment claim must be denied because "the record provides no factual basis" to support a finding that anyone's freedom of expression has been curtailed (App. 8a n.5), fundamentally misapprehend both appellants' argument and this Court's decisions. The determination of how much of one's resources to devote to protected advocacy is *itself* of First Amendment significance, regardless of whether one can prove by some extrinsic measure that a restraint on a client's freedom to compensate counsel will objectively "impair" that advocacy.[20] The result in *Buckley* did not turn on whether par-

[19] In *Munson*, this Court repudiated the assumption that any charitable organization which spends more than 25% of its receipts on the cost of soliciting those contributions is guilty of fraud, 104 S.Ct. at 2849-2850, 2853 n.16, on the ground that among the factors pushing *some* organizations over the 25% mark was the combination of solicitation with discussion and advocacy. *Id.* at 2850. In the case at hand, a similar "due regard for the reality" that attorneys' fees include compensation for First Amendment speech requires the repudiation of the legislative assumption that any plaintiff who pays his attorney more than a statutorily-prescribed portion of his award has been induced to squander his recovery. Such paternalism is appropriate only in the case of minors and incompetents.

[20] This right to decide how much to allocate to legal advocacy exists, of course, only where legal advocacy has always been understood to be a part of

ticular political campaigns would be immobilized or particular candidates defeated by the expenditure limits. Nor was proof that particular charitable groups would be forced to curtail substantially their advocacy and pamphleteering in order to comply with the 25% ceiling on fundraising expenses required to invalidate the statute in *Munson*. And evidence of *whose* advocacy would be restricted, or of *which* malpractice suits would be doomed or threatened, is simply not relevant to the First Amendment issue in this case. For the questions of *how much* should be spent, on *whom*, and for *what purpose* are questions that individual citizens exercising their rights of speech and petition are constitutionally entitled to answer for themselves, without meddling by even a well-meaning government.

II. By Drastically Restricting the Percentage Levels of Contingency Fees that Malpractice Plaintiffs May Offer Attorneys in Order to Offset the High Risks Associated with Even the Most Meritorious Claims, Section 6146 Effectively Denies a Large Category of Plaintiffs Access to Both Legal Counsel and the Courts of Law, in Violation of those Plaintiffs' Right to Petition for Redress of Grievances.

Section 6146 directly and drastically impairs the right most fundamental to a society governed by law — the right to *enforce* one's rights by petitioning the courts for redress of injuries inflicted against the person in violation of established legal norms. The "right of access to the . . . courts to be heard,"

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the litigation process. *See Walters, supra*, 53 U.S.L.W. at 4955 (criminal proceedings), *id.* (personal injury actions) (citing *United Mine Workers* and *Railroad Trainmen*).

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), has been adopted "over the course of centuries . . . as a means for redressing grievances, resolving disputes, and vindicating rights," *Zauderer* v. *Office of Disciplinary Counsel*, 53 U.S.L.W. at 4592. This Court has observed that because "[f]reedom of access to the courts is a cherished value," there is "the strongest presumption of open access to all levels of the judicial system." *Talamini* v. *Allstate Insurance Co.*, 53 U.S.L.W. 3683, 3685 (March 25, 1985) (Stevens, J., concurring); *id.* at 3684 (Burger, C.J.); *see also Zauderer, supra* 53 U.S.L.W. at 4592.

Of course, "mere access to the courthouse doors . . . does not by itself assure a proper functioning of the adversary process," *Ake* v. *Oklahoma*, 53 U.S.L.W. 4179, 4181 (Feb. 26, 1985); individuals must have "the means of effectuating" their rights, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977): legal counsel. No one could deny California's power to regulate the practice of law within its borders. Yet, in a long line of decisions, this Court has nevertheless held that a "State [may] not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits," *Brotherhood of Railroad Trainmen, supra*, 377 U.S. at 7; *see also United Transportation Union, supra*, 401 U.S. at 584-586; *United Mine Workers, supra*, 389 U.S. at 221-223. "[M]eaningful access to the courts . . . would be a hollow promise" if the state were free to deny citizens "the means of enabling [themselves] to meet the costs of legal representation." *United Transportation Union*, 401 U.S. 585-586; *see also United Mine Workers*, 389 U.S. at 221-222.

The judgment below does precisely this. By leaving both affluent plaintiffs and wealthy defendants free to pay their lawyers whatever the market may demand in malpractice cases on an hourly basis regardless of victory or defeat, Section 6146

singles out plaintiffs of modest or meager means for the *de facto* denial of legal representation and legal redress that only contingency arrangements more generous than those allowed by the statute would make possible for these litigants. No one seriously disputes that virtually all malpractice plaintiffs engage counsel by means of a contingency fee because they can afford a lawyer no other way.[21] California's statutory limit on such fees radically alters the prospects for obtaining legal representation for all but the wealthiest malpractice plaintiffs whose claims, although meritorious, are complex and would require heavy investment by counsel, in terms of both hours of labor and the advancement of litigation expenses, which can easily amount to tens or hundreds of thousands of dollars.[22] Prior to the enactment of Section 6146, non-wealthy plaintiffs in this category could attract lawyers — but only by offering them promises of larger percentages of any eventual recovery, in proportions large enough to compensate for the risk of *no* recovery that complex malpractice litigation on behalf of a plaintiff unable to pay an hourly fee always entails.[23] The more

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[21] *See, e.g., Roa* v. *Lodi Medical Group* (App. 18a-19a) (Bird, C.J., dissenting); *Fracasse* v. *Brent*, 6 Cal.3d 784, 792 (1972); Dietz, Baird & Berul, The Medical Malpractice Legal System, Appendix to the Report of the Secretary's Commn. on Medical Malpractice 87, 114 (Dept. of Health, Educ. & Welfare Pub. No. (OS) 73-88) (1973) ("HEW Report").

[22] Even the principal sponsor of California's MICRA acknowledged that "a malpractice case is extremely difficult to prove, demands a great deal of research into causal factors and exhausts a tremendous amount of time on the part of the attorney." Keene, "California's Medical Malpractice Crisis," in A Legislator's Guide to the Medical Malpractice Issue 29-30 (Warren & Merritt eds.) (1976); (*see also* App. 21a) (Bird, C.J., dissenting).

[23] Chief Justice Bird pointed out in dissent a fact that the majority below could not and did not dispute: typically, only one out of every three medical negligence cases that are taken to trial concludes with a judgment for the plaintiff (App. 21a) (Bird, C.J., dissenting); The Medical Malpractice Insurance Crisis in California: The Report of the Auditor General 28 (1975).

severe the injury, the more difficult the case, for health care providers and their insurance companies naturally allocate the greatest resources and the ablest defense counsel to contesting those claims which threaten to generate the largest damage awards. Yet the sliding scale in Section 6146 *diminishes* with increasing net recovery beyond the $200,000 mark regardless of risk, denying all but the wealthiest of plaintiffs the ability to offset increasing risk with correspondingly increasing promises of compensation. The inevitable impact of Section 6146 is thus as oppressive as it is ironic: it impairs most the access to counsel of those prospective plaintiffs who are most grievously injured *and* most in need of highly skilled attorneys that they can least afford.

Prior to Section 6146, most privately negotiated variable contingency fees were based not solely on dollar recovery but also on whether the case was terminated by settlement, by trial, or only after appeal.[24] The legislated fee schedule ties the compensation percentage solely to the size of the recovery. The former contingency fee system was roughly progressive, since the payment to the lawyer varied relative to the amount of time, effort and skill the lawyer invested: as the case proceeded from settlement negotiations to motion practice, trial and appeal, the percentage of attorney entitlement increased.

In stark contrast, Section 6146 is *regressive*, since the attorney's share of the recovery not only remains constant even if the litigation drags on through appeal, but declines steeply as the award increases. Under Section 6146, a net recovery by the plaintiff of $200,000 generates a fee of approximately $62,000, regardless of whether that recovery came from a quickly negotiated settlement or from complex and costly litigation ultimately resolved only in the California Supreme Court — or in this Court.

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[24] (*See* App. 33a-35a) (Bird, C.J., dissenting); HEW Report at 114.

California's contingency fee ceiling simultaneously deters plaintiffs' lawyers from taking or vigorously prosecuting complex malpractice claims and irrationally provides defense counsel with an incentive to *maximize* the burdens of litigation both to coerce meager settlements and to discourage even the filing of claims.[25] In *Brotherhood of Railroad Trainmen* v. *Virginia Bar*, this Court struck down state regulations of the legal profession that created a legal services market in which personal injury plaintiffs were denied meaningful access to counsel, thereby leaving them "prey on the one hand to persuasive claims adjustors eager to gain a quick and cheap settlement," or on the other hand to "lawyers either not competent to try these lawsuits against the able and experienced [defense] counsel or too willing to settle a case for a quick dollar." 377 U.S. at 3-4. Because Section 6146 works a similar deprivation, this case merits the Court's plenary review.

Despite the huge body of precedent mandating exacting scrutiny of laws that regulate First Amendment activity, the California Supreme Court subjected the challenged law to the most minimal scrutiny — the only level that this law could even *arguably* survive, and then only if rationality review were as toothless as its critics sometimes charge. *But see City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 53 U.S.L.W. 5022, 5024 (July 1, 1985) (striking down, under the "minimum level of judicial scrutiny," application of an ordinance requiring a special use permit for the operation of a group home for the mentally retarded). The judgment below rested on this deferential approach because the court below confused the undeniable fact that one cannot be sure in advance exactly *whose* access to court and *whose* damage claims will be destroyed, with the

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[25] In this regard, section 6146 may work to *increase* malpractice insurance costs, since every extra dollar paid to defense counsel, in contrast to the contingent fees of plaintiffs' counsel, constitutes a full dollar's expense to the insurance companies, which is passed on in the form of higher premiums.

untenable illusion that perhaps *no one's* recovery of damages will really be cut off.

In describing the preclusive effects of the challenged fee limitation as "in large measure an empirical matter" (App. 8a), and in describing the record herein as supplying "no factual basis to support [the] claim" that the limitation *does* have the *general* effect of denying access to some plaintiffs with meritorious claims (App. 8a n.5), the court below overlooked what must be described in all fairness as a *certainty* by fastening on its doubts as to *details* that are immaterial to appellants' overall argument. For all that can fairly be said to be in doubt is the exact *identity* and *number* of the meritorious claims and deserving claimants who will, by virtue of Section 6146, find themselves denied adequate representation and effectively precluded from winning the malpractice recovery they merit.

The circumstance that many of this law's victims may not be individually identifiable and can be known to exist only as a statistical group certainly cannot justify treating those victims as though they did not exist at all. This Court's decisions in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), and in such group litigation cases as *NAACP* v. *Button*, *United Mine Workers*, and *United Transportation Union*, flatly prelude the judicial practice of disregarding denials of access and destructions of claims simply because many of the victims of such denials and destructions are at best identifiable as a statistical group.

When Congress in the Price-Anderson Act eliminated causes of action for damages in excess of $560,000,000 per nuclear accident, this Court took very seriously indeed the claim by prospective victims of any such accident that their property — the causes of action that they might otherwise pursue — had been taken without just compensation in violation of the Fifth Amendment. See *Duke Power*, *supra*, 438 U.S. at 84-94.

Although the Court found no Fifth Amendment violation, the fact that one could point to no particular victim — no specifically ascertainable individual — and say, "There is someone who is denied damages he would have received but for the Price-Anderson Act," did not relieve the Court of the obligation to deal fairly with the argument of prospective victims in general to the effect that *some* of them — although no one could say *who* or *how many* — would, by virtue of the challenged federal legislation, lose some of the damage awards to which they would have been entitled at common law.

The level of judicial scrutiny required here must be even *greater* than that in *Duke Power*, since this case involves not a refashioning of the underlying substantive rules of liability — as to which the standard of review may properly be a somewhat deferential one, see *id.* at 83 — but "a procedural limitation on the claimant's ability to assert his rights," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) — as to which far less deference has been deemed appropriate.

Nor can *Duke Power* be distinguished from the instant case on the ground that all who challenged the Price-Anderson Act could show, from the face of the legislation in question, that they would lose even the *opportunity* to recover damages in excess of the Act's aggregate liability ceiling. For the long line of group legal service decisions — from *Button* through *United Mine Workers* and *United Transportation Union* — proceeds on the premise that wholesale legislative restrictions on arrangements for compensating plaintiffs' attorneys must be assessed as precluding access to court for redress of legal grievances to the degree that the challenged restrictions would predictably make it impractical for some groups to pursue such redress, and must be so assessed notwithstanding the impossibility of identifying *which* plaintiffs are thereby precluded, or of measuring the exact *degree* to which such preclusion operates. *See, e.g., United Mine Workers, supra,* 389 U.S. at 221-224; *United Transportation Union, supra,* 401 U.S. at 580-582.

If the court below had applied the proper standard of review, none of the state interests advanced on behalf of Section 6146 could even arguably withstand "the exacting scrutiny applicable to limitations on core First Amendment rights," *In re Primus*, 436 U.S. 412, 432 (1978); *Buckley* v. *Valeo*, *supra*, 424 U.S. at 44-45. In particular, the California Supreme Court stated that Section 6146 was one of a series of measures "aimed at reducing medical malpractice insurance costs." (App. 12a.) It is more than doubtful that Section 6146 serves any such objective. Since a contingency fee is by definition paid out of the plaintiff's recovery, and since juries may not properly consider contingency fees in assessing damages under California law,[26] reducing the allowable percentages of such fees may mean that plaintiffs will receive more of the damage award in those cases that surmount the obstacle of Section 6146 and make it into court, but defendants and their insurance companies will not thereby pay less. *See Niles* v. *City of San Rafael*, 42 Cal.App.3d 230, 244 (1st Dist. 1974). Indeed, the legislative history of Section 6146 indicates that the California Assembly was aware of this fact and did not seriously contend that limiting plaintiffs' attorneys' fees would do anything to alleviate the "crisis" in malpractice insurance.[27]

The only way that Section 6146 could possibly reduce insurance costs would be by reducing the number of claims filed and successfully prosecuted against health care providers and their insurers — a result that the statute could achieve only by significantly impairing the ability of injured claimants to

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[26] *Roa* (App. 12a); *Krouse* v. *Graham*, 19 Cal. 3d 59, 79-82 (1977).

[27] *See, e.g.*, Hrngs. of the Assembly Select Comm. on Medical Malpractice (Feb. 18, 1975) at 87-89, 104-105; Hrngs. of the Assembly Select Comm. on Medical Malpractice (Feb. 21, 1975) at 80-87; The Medical Malpractice Insurance Crisis in California: The Report of the Auditor General 30 (1975) (concluding that Section 6146 would have little, if any, effect on insurance premiums).

retain counsel to represent them vigorously in court. But this Court has consistently rejected "the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Zauderer, supra,* 53 U.S.L.W. at 4592; *Bates* v. *State Bar of Arizona,* 433 U.S. at 376.

The court below also opined that the legislature may have restricted contingency fees in order to screen out "frivolous" lawsuits (App. 13a). Such an interest can be neither credibly attributed to the legislature nor deemed compelling in the face of the legislature's own conclusion that there was no significant evidence of such meritless litigation.[28] The traditional contingency fee arrangement induces plaintiffs' lawyers themselves to screen out frivolous claims; the legislature itself found a 95% rejection rate of claims prospective plaintiffs brought to a lawyer's attention.[29] Diminishing the attorney's permissible recovery creates only a disincentive to take on *economically* marginal cases, without regard to whether they have merit. Just as the state "is not entitled to prejudge the merits of its citizens' claims by choking off access to information" about their legal rights, *Zauderer, supra,* 53 U.S.L.W. at 4592 n.12, so it may not effectively decide the fate of those claims by choking off access to legal representation. At all events, Section 6146's *absolute* limit on contingency fees cannot be justified by the fear that unregulated fees "may lead some [citizens] to initiate meritless litigation against innocent defendants. . . . [I]f the State's concern is with abuse of process, it can best achieve its aim by enforcing sanctions against vexa-

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[28] Preliminary Report of the Select Comm. on Medical Malpractice 5 (June 1974) ("Select Comm. Rep."); *see also* Report of the ABA Commn. on Medical Professional Liability 61 (1977).

[29] Select Comm. Rep. at 43.

tious litigation."[30] *Id.*; *see also Bates, supra,* 433 U.S. at 375 n.31.[31]

Finally, the court below suggested that the legislature could have concluded that severely limiting contingency fees was an "'appropriate means of protecting the already diminished compensation' of such plaintiffs from further reduction by high contingency fees." (App. 14a.) That is, because the other legislative remedies enacted by the California Assembly significantly reduce the recoveries of malpractice plaintiffs, Section 6146 was added to make certain that those plaintiffs would not have to allocate much of their awards to paying their attorneys. *But before a plaintiff can "squander" his recovery on the legal advocacy that generated it, he must first retain a lawyer and win his case.* Malpractice plaintiffs' attorneys must recoup relatively large fees in the one out of three trials that they win in order to make up for the utter dearth of compensation received in the other two-thirds of their cases, which they lose.[32] A rule that frustrates a claimant's access to court

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[30] The same reasoning applies with respect to the California Supreme Court's related supposition that Section 6146 was meant to "'reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage,'" (App. 15a) (citation omitted).

[31] Even if there were a genuine epidemic of groundless litigation against physicians in California, that state's law provides a panoply of more carefully tailored remedies, including disciplinary proceedings against counsel, sanctions for proceeding in bad faith (Cal.Code Civ.Proc. Section 128.5), and malicious prosecution actions.

[32] *See Bentley* v. *Industrial Accident Commn.*, 75 Cal. App. 2d 547, 550 (1946) ("Fairness" of fees must be judged with an eye to making the service available and not "with the sole purpose in view of saving the [client] from expense"); F. MacKinnon, Contingent Fees For Legal Services 28-29, 159-194 (1964). As Chief Justice Bird noted without contradiction, over 400 attorney hours are expended in the average malpractice case that garners no recovery after trial. (App. 31a); Reder, "Contingent Fees in Litigation With Special Reference to Medical Malpractice," in The Economics of Medical Malpractice

and counsel in the name of increasing that claimant's share of a damage award that can only be obtained with the aid of counsel, is worse than a false economy: it is a gross infringement of the claimant's First Amendment right to petition the government for redress.

III. THE HOLDING IN *Walters* v. *Nat. Assn. of Radiation Survivors*, WHICH INVOLVED THE RIGHT TO COUNSEL IN NON-ADVERSARIAL, ADMINISTRATIVE APPLICATIONS FOR NON-ESSENTIAL GOVERNMENT BENEFITS, LEFT OPEN THE PRECISE QUESTIONS RAISED BY THIS APPEAL.

To the extent that the opinion in *Walters* previewed the merits of any ultimate resolution of the constitutional issues presented in that case,[33] its teachings underscore the importance of the federal questions presented by the instant appeal. For the *Walters* Court explicitly "recognize[d] that a First Amendment [right to pay an attorney] attach[es] . . . in the absence of a 'meaningful' alternative."[34]

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218 n.22 (Rottenberg ed.) (1978). That the California Assembly appears to have accepted this proposition, *see* Select Comm. Rep. at 48, suggests that the proffered legislative objective of saving plaintiffs from the excessive demands of their lawyers is a creation of the California Supreme Court's imagination.

[33] By its express terms, *Walters* held only that, on the facts presented, the district court had "abused its discretion" in issuing a nationwide preliminary injunction. 53 U.S.L.W. at 4955; *id.* at 4956 (O'Connor, J., concurring). The merits of the underlying constitutional issues were not decided, "inasmuch as any conclusions reached at the preliminary injunction stage are subject to revision," *id.* at 4951 (Op. of the Court); *id.* at 4956 (O'Connor, J., concurring), and the constitutional "claims of any individuals or identifiable groups . . . remain open on remand." *Id.*; *id.* at 4961 n.37 (Brennan, J., dissenting).

[34] 53 U.S.L.W. at 4956. Since there are no service organizations that represent malpractice plaintiffs for free, retaining counsel on a contingency fee is the *only* "meaningful" alternative in cases such as this.

Equally significant, the underlying property interests at issue in *Walters* were supplemental, non-essential government benefits, 53 U.S.L.W. at 4948, 4955, while what is at stake in the malpractice litigation underlying this case is the *liberty* interest in being made whole — the "right to . . . obtain judicial relief for unjustified intrusions on personal security," *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977); *see id.* at 674, 675; *id.* at 692, 695 (White, J., dissenting). The majority in *Walters* found the nature of the underlying interest to be "determinative of the right to employ counsel." 53 U.S.L.W. at 4955. Private litigation undertaken by plaintiffs to seek recovery from the tortfeasors who have injured them in violation of legal norms surely warrants the recognition of a right to employ an attorney. As Chief Justice Marshall wrote in *Marbury* v. *Madison*, "the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) 137, 162 (1803).

It is surely a substantial federal question whether the deference this Court accorded Congress in determining how best to administer a program of supplementary, non-"need-based" transfer payments is to be read as giving the states carte blanche to legislate debilitating wholesale restrictions on the only means of retaining counsel that is available to all but the wealthiest plaintiffs in private negligence actions.

Indeed, any such reading of *Walters* would seem most farfetched. For the *Walters* majority repeatedly stressed that the administrative process for which the appellees there sought legal counsel "does not contemplate the adversary mode of dispute resolution utilized by *courts* in this country." 53 U.S.L.W. at 4949 (emphasis added); *see id.* at 4952, 4953, 4955. The need to retain a legal advocate was further diminished in *Walters* by the fact that the application process was expressly designed — and the government panel expressly

instructed — to favor the claimant,[35] and by the fact that trained service representatives were provided without charge by various veterans organizations to any claimant who requested assistance. *Id.* at 4949, 4955. Unlike *Walters*, in the instant case there is no informal and nonadversarial system of dispute resolution that must be protected from an infusion of lawyers. *See id.* at 4952-4953. Malpractice plaintiffs take their cases to court, not to an indulgent federal agency. And unlike the applicants in *Walters*, *see* 53 U.S.L.W. at 4949, they must contend with cross-examination, formal rules of evidence, statutes of limitation, the effects of *res judicata* and the opposition of skilled and well-financed defense attorneys.[36] For malpractice plaintiffs, "the contingent fee arrangement offers the only realistic hope of establishing a legal claim." *Fracasse* v. *Brent*, 6 Cal.3d 784, 792 (1972). Finally, in this appeal, cases such as *United Mine Workers* and *Railroad Trainmen* cannot be brushed aside. For, unlike *Walters*, the plaintiffs here assert their First Amendment right to counsel "for proceedings where counsel [are] allowed to appear." 53 U.S.L.W. at 4955. *See* II, *supra*.

Thus, to dismiss this appeal or to affirm the judgment below in the wake of *Walters* could only provoke speculation throughout the state and lower federal courts, that, for all this Court's disclaimers to the contrary,[37] *Walters* portended a wide-ranging

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[35] The government panel was "required by regulation 'to assist a claimant in developing the facts pertinent to his claim,'" *id.* at 4949, and "to resolve all reasonable doubts in favor of the claimant," *id.*; *see also id.* at 4955.

[36] In *Walters* the Court stated that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding." 53 U.S.L.W. at 4955.

[37] *See, e.g.*, 53 U.S.L.W. at 4955; *id.* at 4956 (O'Connor, J., concurring).

repudiation of *all* plaintiffs' liberty interests in retaining legal advocates to vindicate their private rights against those who wrongfully injure them.

Respectfully submitted,

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Appendix A.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

FRANK ROA, JR., et al.,
Plaintiffs and Appellants,

v.

S.F. 24435
Super. Ct. 137828

LODI MEDICAL GROUP, INC., et al.,
Defendants and Respondents.

FILED
FEB 7 1985

This is the third in a series of cases involving the constitutionality of various provisions of the Medical Injury Compensation Reform Act of 1975 (MICRA). In American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359, we upheld a provision of the act which authorizes the periodic payment of damages in medical malpractice actions. (Code Civ. Proc., § 667.7.) In Barme v. Wood (1984) 37 Cal.3d 174, we concluded that a provision of the act barring a "collateral source" from obtaining reimbursement from a medical malpractice defendant was also constitutional. (Civ. Code, § 3333.1, subd. (b).) In this case we address a challenge to Business and Professions Code section 6146, which places limits on the amount of fees an attorney may obtain in a medical malpractice action when he represents a party on a contingency fee basis.[1] As in *American Bank* and *Barme*, while we express

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[1] Section 6146 provides in relevant part: "(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in

no view as to the wisdom of the measure, we conclude that the legislation is constitutional.

I

This action was brought by Frank Roa, Jr., individually, and by Yvonne Jean Roa, individually and as guardian ad litem for their minor son, Frank Joseph Roa, for injuries allegedly suffered as a result of negligent treatment and care during the child's birth. The complaint named the Lodi Medical Group, Inc., Dr. Gordon B. Roget, the Lodi Community Hospital and numerous Does as defendants.

After some discovery, plaintiffs negotiated a settlement with two of the defendants, the Lodi Medical Group, Inc., and Dr. Roget. The agreement provided for payment of $495,000 to the minor and $5,000 to the parents. Pursuant to Probate Code section 3500,[2] plaintiffs sought court approval of the settlement,

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connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits: [¶] (1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000 recovered. [¶] (3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered. (4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000). [¶] The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind. [¶] . . . [¶] (c) For purposes of this section: [¶] (1) 'Recovered' means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose. . . ."

[1] Unless otherwise stated, all section references are to the Business and Professions Code.

[2] Section 3500 provides in relevant part: "(a) When a minor has a disputed claim for damages . . . and does not have a guardian of the estate, the following persons have the right to compromise . . . the claim . . . : [¶] (1) Either

advising the court that the $500,000 represented the total policy limits of these two defendants' insurance coverage. The court found the settlement reasonable and approved it.

At the same time, pursuant to Probate Code section 3601,[3] plaintiffs requested that the court approve the payment of fees to their attorneys from the net proceeds of the settlement. Plaintiffs informed the court that they were aware that the maximum fee that could be awarded under the schedule of contingency fees set forth in section 6146 would amount to about $90,800. They explained, however, that they believed that under their contingency fee arrangement, the attorneys were entitled to 25 percent of the minor's net recovery — about $122,800 — and asked the court to award their counsel this greater amount. Accompanying this request, plaintiffs' attorneys filed points and authorities asserting that section 6146 was unconstitutional on due process, equal protection and separation of powers grounds.

The trial court found (1) that plaintiffs and their attorneys had entered into an understanding that the attorney fee would be 25 percent of the net recovery and (2) that the $122,800 fee which that percentage would yield "is a fair and reasonable amount for attorneys' fees in this case and is in no way disproportionate to the quality or quantity of the legal services provided to the plaintiffs in this case." The court also noted that "were it not for the existence of Business and Professions Code [section] 6146, the amount of attorneys' fees requested" by

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parent if the parents of the minor are not living separate and apart. . . . [¶] (b) The compromise or covenant is valid only after it has been approved, upon the filing of a petition, by the superior court . . . ."

[3] Section 3601 provides in relevant part: "(a) The court making the order or giving the judgment [approving the compromise of a minor's disputed claim], as a part thereof, shall make a further order authorizing and directing that such reasonable expenses . . . costs, and attorney's fees, as the court shall approve and allow therein, shall be paid from the money or other property to be paid or delivered for the benefit of the minor or incompetent person."

plaintiffs would be awarded. The court, however, rejected the constitutional challenge to section 6146 and concluded that it was compelled to award fees in accordance with the statutory limitations. Accordingly, it approved a fee of $90,800.

Plaintiffs appeal from the attorney fee order, reasserting their constitutional objections to section 6146.[4]

II

Plaintiffs, and amici on their behalf, contend that section 6146 is unconstitutional as (1) a denial of due process, (2) a violation of equal protection, and (3) a violation of the sep-

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[4] One amicus questions whether plaintiffs may properly maintain this appeal. Because the trial court order has the effect of preserving more of the settlement for the minor's own use than the fee requested by plaintiffs, amicus suggests that plaintiffs are not "aggrieved" by the trial court order and may not prosecute this appeal on their own behalf. (See Code Civ. Proc., § 902.) Amicus asserts that if plaintiffs' attorneys were dissatisfied, they should have challenged the order themselves.

Although the attorneys may well have had standing to appeal from the order in question (cf., e.g., Estate of Merrill (1946) 29 Cal.2d 520, 523), it does not necessarily follow that plaintiffs are not themselves entitled to prosecute this appeal. (See Estate of Lagerson (1962) 210 Cal.App.2d 788, 791-792.) While many in plaintiffs' position might not consider themselves aggrieved by the trial court ruling, one of plaintiffs' contentions on appeal is that the fee limitations of section 6146 are invalid because they impinge on the right of malpractice plaintiffs to retain competent counsel. Plaintiffs argue that if the statutory limits remain in place, their attorneys will have less of an incentive to pursue additional recovery against the remaining defendants who are not covered by the settlement. We conclude that plaintiffs should not be deprived of the opportunity to pursue this substantive argument on appeal by a threshold determination that they are not "aggrieved" as a matter of law.

We have no occasion to decide at this juncture whether, as a matter of professional ethics, the potential conflict of interest between plaintiffs and their attorneys on the attorney fee issue called for separate representation of their interests. We hold only that the appeal may properly be maintained by plaintiffs. We note that numerous amicus briefs have been filed on both sides of the constitutional issue, assuring that the competing viewpoints are adequately represented.

aration of powers doctrine. We address each of the contentions in turn.

A

Plaintiffs' due process argument rests on the claim that the statute impermissibly infringes on the right of medical malpractice victims to retain consel in malpractice actions. Although the right to be represented by retained counsel in civil actions is not expressly enumerated in the federal or state Constitution, our cases have long recognized that the constitutional due process guarantee does embrace such a right. (See, e.g., Powell v. Alabama (1932) 287 U.S. 45, 68-69; Mendoza v. Small Claims Court (1958) 49 Cal.2d 668, 673.) Section 6146, however, does not in any way abrogate the right to retain counsel, but simply limits the compensation that an attorney may obtain when he represents an injured party under a contingency fee arrangement.

Statutory limits on attorney fees are not at all uncommon, either in California or throughout the country generally. In this state, attorney fees have long been legislatively regulated both in workers' compensation proceedings (Lab. Code, § 4906) and in probate matters. (Prob. Code, §§ 910, 901.) Some states have adopted maximum fee schedules which apply to *all* personal-injury contingency fee arrangements (see, e.g., American Trial Lawyers v. New Jersey Supreme Ct. (1974) 66 N.J. 258 [330 A.2d 350]; Gair v. Peck (1959) 6 N.Y.2d 97 [188 N.Y.S.2d 491, 160 N.E.2d 43], app. dismissed (1960) 361 U.S. 374); others have enacted limits which, like section 6146, apply only in a specific area, such as medical malpractice. (See, e.g., Johnson v. St. Vincent Hospital, Inc. (Ind. 1980) 404 N.E.2d 585, 602-603; Prendergast v. Nelson (Neb. 1977) 256 N.W.2d 657, 669-670; DiFilippo v. Beck (D.Del. 1981) 520 F.Supp. 1009, 1016.) Congress has passed numer-

ous statutes limiting the fees that an attorney may obtain in representing claimants in a variety of settings. (See, e.g., 28 U.S.C. § 2678 [limit on attorney fee in actions under the Federal Tort Claims Act]; 42 U.S.C. § 406(b)(1) [limit on attorney fee in actions under the Social Security Act]; 38 U.S.C. § 3404 [limit on fee for claims under the Veterans Benefit Act].)

The validity of such legislative regulation of attorney fees is well established. Over 60 years ago, in Calhoun v. Massie (1920) 253 U.S. 170, an attorney who had represented successful claimants in an action against the United States raised a similar due process challenge to a provision of federal law which limited contingent fee recoveries to 20 percent of the amount recovered. In rejecting the challenge, Justice Brandeis explained: "For nearly three-quarters of a century Congress has undertaken to control in some measure the conditions under which claims against the Government may be prosecuted. Its purpose has been in part to protect just claimants from extortion or improvident bargains and in part to protect the Treasury from frauds and imposition. [Citation.] While recognizing the common need for the service of agents and attorneys in the presentation of such claims and that parties would often be denied the opportunity of securing such services if contingent fees were prohibited [citation], Congress has manifested its belief that the causes which gave rise to laws against champerty and maintenance are persistent. By the enactment, from time to time, of laws prohibiting the assignment of claims and placing limitations upon the fees properly chargeable for services, Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage. *The constitutionality of such legislation* . . . resembling in its nature the exercise of the police

power, *has long been settled*. [Citations.]" (Italics added, fn. omitted.) (253 U.S. at pp. 173-174; see, e.g., Frisbie v. United States (1895) 157 U.S. 160, 165-166; Yeiser v. Dysart (1925) 267 U.S. 540, 541; Margolin v. United States (1925) 269 U.S. 93, 102; Estate of Goodrich (1907) 6 Cal.App. 730, 732.) These decisions establish that — contrary to amici's contentions — legislative ceilings on attorney fees are in no respect "constitutionally suspect" or subject to "strict" judicial scrutiny.[5]

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[5] One amicus — in an argument embraced by the dissent — attempts to invoke "strict judicial scrutiny" on a different tack. Noting that the right to maintain a lawsuit has been viewed as one aspect of the First Amendment right to petition the government for redress of grievances (see, e.g., United Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 222-223), and that in Buckley v. Valeo (1976) 424 U.S. 1, 51-54, the Supreme Court, inter alia, invalidated, on First Amendment grounds, statutory limits on the amount of his own funds a candidate could spend in seeking public office, amicus argues that "the decision of how much should be spent, and is necessary to spend, [on attorney fees] is one which [plaintiffs] desiring to exercise their First Amendment rights of petition and speech are constitutionally entitled to make for themselves." Although the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing *any* limitation on attorney fees, no matter how unconscionably high such fees might be, a position even amicus does not embrace.

The use of contingency fees in connection with the pursuit of First Amendment activities has historically been the subject of governmental regulation and restriction. Indeed, California — like a great number of states — has long *completely prohibited* lobbyists, including attorney-lobbyists, from using contingency fee agreements in connection with the most "hardcore" of First Amendment activities. (See Gov. Code, § 86205, subd. (f) ["No lobbyist shall . . . (f) Accept or agree to accept any payment in any way contingent on the defeat, enactment or outcome of any proposed legislative or administrative action."]. See generally Maggio, *Lobbying — Multistate Statutory Survey* (1962) 38 Notre Dame Law. 79, 85-86.) We are unaware of any decision which questions the validity of such legislation.

Of course, unlike the lobbyist provision, section 6146 does not prohibit the use of contingency fees in medical malpractice actions, but simply places limits on the percentage of a plaintiff's recovery that an attorney may retain when he represents the plaintiff on a contingency basis.) To the extent that amicus' —

Plaintiffs contend, however, that even if statutory limitations on attorney fees are generally permissible, the limits established by section 6146 are invalid because the authorized fees are so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them. The adequacy of the fees permitted by the statute is in large measure an empirical matter, and plaintiffs have made no showing to support their factual claim. Furthermore, a comparison of the fees permitted by section 6146 with the fees authorized under the numerous statutory schemes noted above suggests that section 6146's limits are in fact quite generous.[6]

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and the dissent's — First Amendment contention rests on the proposition that the particular fees allowed by section 6146 are too low to permit the effective exercise of the right to bring a lawsuit, the argument parallels plaintiff's claim — discussed below — that the statute denies his due process right to counsel by making it difficult or impossible to secure an attorney. As we explain, the record provides no factual basis to support such a claim.

[6] As noted, section 6146 authorizes a contingency fee of up to (1) 40 percent of the first $50,000 recovered, (2) 33 ⅓ percent of the next $50,000, (3) 25 percent of the next $100,000, and (4) 10 percent of any amount exceeding $200,000.

Under the New Jersey schedule upheld in American Trial Lawyers v. New Jersey Supreme Ct., *supra*, 330 A.2d 350, which provided something of a model for section 6146, the maximum permissible fees were: (1) 50 percent of the first $1,000, (2) 40 percent of the next $2,000, (3) 33 ⅓ percent of the next $47,000, (4) 20 percent of the next $50,000, and (5) 10 percent of any amount over $100,000. (See 330 A.2d at p. 351, fn. 3.) The New Jersey rule also permitted an attorney to request additional fees in exceptional situations. Under that schedule, the fee for the settlement in this case would have been limited to approximately $66,400, rather than the $90,800 permitted by section 6146. Although — as the dissent notes — the New Jersey schedule has since been modified somewhat, section 6146 still permits a larger attorney fee than the revised New Jersey provision.

The federal statutes generally designate a single, maximum percentage fee, applicable without regard to the amount of the recovery. The Federal Tort Claims Act limits fees to 25 percent of a judgment or settlement obtained after a court action has been filed, and 20 percent of any recovery obtained prior to such filing. (28 U.S.C. § 2678.) The Social Security Act authorizes reasonable fees not in excess of 25 percent of the claimant's recovery. (42 U.S.C.

Under the circumstances, we certainly cannot hold that the amount of the fees permitted renders the statute unconstitutional on its face.

Plaintiffs alternatively challenge the "sliding scale" nature of the fee schedule, asserting that the decreasing percentage permitted for larger recoveries creates a conflict of interest between attorney and client, reducing the attorney's incentive to pursue a higher award. As a number of commentators have explained, however, potential conflicts of interest are inherent in all contingent fee arrangements. (See generally MacKinnon, Contingent Fees for Legal Services (1964) pp. 196-200; Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation* (1970) 22 Stan.L.Rev. 1125, 1136-1139.) On the one hand, whenever a contingency fee agreement provides for either a flat percentage rate regardless of the amount of recovery or a declining percentage with an increase in recovery, "it may be to the lawyer's advantage to settle [the case] quickly, spending as little time as possible on the small claim where the increment in value through rigorous bargaining or trial, while significant to the client, is not significant or perhaps compensatory to the lawyer. . . ." (MacKinnon, *supra*, at p. 198.) On the other hand, "[w]here the rate is

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§ 406(b)(1).) The Veterans Benefit Act contains perhaps the most restrictive provision, limiting the fee that may be obtained by anyone assisting a claimant to a mere $10. (38 U.S.C. § 3404.) Although this provision has been upheld against constitutional challenge in numerous decisions (e.g., Frisbie v. United States (1894) 157 U.S. 160, 165-166), one federal district court recently enjoined its application, concluding that the practical effect of this low limit raised substantial doubts as to the statute's continuing constitutional viability. (National Assn. of Radiation Survivors v. Walters (N.D.Cal. 1984) 589 F.Supp. 1302.) The United States Supreme Court has noted probable jurisdiction in the *Walters* case (Walters v. National Assoc. of Rad. Survivors (1984) ___ S.Ct. ___)* and has stayed the district court's injunction pending review of the decision. (105 S. Ct. 11 [stay granted by Rehnquist, J.]; 105 S.Ct. 238 [request to vacate stay denied by court].)

*53 U.S.L.Week 3435.

graduated according to the stage of litigation at which recovery is attained . . . the increase in the rate of fee may lead the lawyer to bring suit or start trial, for example, solely to increase his rate from 25% to 33 ⅓%, without actually doing that much additional work and without the likelihood of a comparable increment to the client." (*Ibid.*) Furthermore, no matter how the particular percentage fee is calculated, "[t]he difference in the financial position of the lawyer and client may make for a complete disparity in their willingness to take a risk on a large recovery as against no recovery at all. In the same way the use of delay to increase the eventual recovery on a claim may have an entirely different impact on the injured and uncompensated claimant than it does on the lawyer, who is busy with other claims and regards this as one of a series which are ripening on the vine. . . ." (*Id.* at p. 199.) Thus, though the sliding scale arrangement embodied in section 6146 may affect the settings in which the attorney's and client's interests diverge, it does not create the basic conflict of interest problem.

Indeed, section 6146's decreasing sliding-scale approach has been recommended as the preferable form of regulation by a number of studies that have examined the question. As a report of an American Bar Association commission explained: "[I]n order to relate the attorney's fee more to the amount of legal work and expense involved in handling a case and less to the fortuity of the plaintiff's economic status and degree of injury, a decreasing maximum schedule of attorney's fees, reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation, should be set on a state-by-state basis." (Rep. of Com. on Medical Professional Liability (1977) 102 ABA Annual Rep. 786, 851. See also Dept. of HEW, Rep. of Sect's. Com. on Medical Malpractice (1973) pp. 34-35; Kohlman, *An Equitable Contingency Fee Contract* (1975) 50 State Bar J. 268, 295-298 & fn. 42.) For just these reasons, the Legislature

could rationally have determined that this aspect of the statutory scheme would promote the fairness of attorney fees. The sliding scale schedule certainly does not unconstitutionally impinge on a malpractice victim's right to counsel.

Finally, plaintiffs suggest that because the fee limits of section 6146 apply only to medical malpractice actions, the statute will operate to drive the most competent attorneys out of medical malpractice litigation into other areas of personal injury practice: they argue that this amounts to an unconstitutional infringement of a malpractice victim's right to counsel. Once again, plaintiffs have failed to make any showing to support the factual premise of their contention. In addition, a similar claim could, of course, be raised with respect to every statutory provision which creates legislative limits on attorney fees in a particular field. As we have seen, such statutes are commonplace. Suffice it to say that we know of no authority which suggests that due process requires a single, uniform attorney fee schedule for all areas of practice.

B

We turn to the equal protection claim. Here plaintiffs' principal contention — somewhat related to their final due process argument — rests on the assertion that the Legislature acted arbitrarily in selectively imposing section 6146's attorney fee limits only in medical malpractice actions.

In *American Bank* and *Barme* we explained the background against which MICRA was adopted and there is no need to repeat that discussion here. In brief, the Legislature found that the high cost of medical malpractice insurance premiums was (1) threatening to curtail the availability of medical care in the state and (2) creating a situation in which patients, injured by medical malpractice, might well find that there was no liability insurance to cover the damages they had sustained. To meet

those problems, the Legislature enacted a series of measures aimed at reducing medical malpractice insurance costs. In *American Bank* and *Barme* we found that it was entirely rational for the Legislature to limit the application of the enacted measures to the medical malpractice field, since it was the "crisis" in that particular area which the Legislature hoped to alleviate.

Plaintiffs contend that this reasoning does not apply to section 6146. They maintain that while the statutory measures at issue in *American Bank* and *Barme* were directly related to reducing the costs borne by medical malpractice defendants and their insurers, section 6146 has no such effect, for it simply limits the percentage of a malpractice *plaintiff's* judgment that may be paid to the plaintiff's attorney. Plaintiffs insist that since a contingency fee is by definition paid from the plaintiff's recovery, and since a jury may not properly consider such fees in assessing damages (see Krouse v. Graham (1977) 19 Cal.3d 59, 79-82), the statutory limitations on such fees will not reduce defense costs at all. They suggest that if the Legislature wanted to reduce such costs, it should have limited the fees malpractice defense attorneys may charge, rather than the contingency fees obtained by attorneys for malpractice plaintiffs.[7]

We cannot agree that the limits on contingency fees embodied in section 6146 bear no rational relationship to the objectives of MICRA. In the first place, it is unrealistic to suggest that such limits will not reduce the costs to malpractice

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[7] In enacting MICRA, the Legislature did adopt a provision directing the Board of Governors of the State Bar to "report and make recommendations to the Legislature by July 1, 1976, on an equitable method for regulating compensation of defense counsel consistent with the policies embodied in this article regarding regulation of plaintiff's attorney fees." (Former § 6146, subd. (c), enacted Stats. 1975, Second Ex. Sess., ch. 1, § 24.2, p. 3967.) After appointing a committee to study the problem, the State Bar recommended that the Legislature take no action with respect to defense fees, and the Legislature repealed former subdivision (c) in 1981. (Stats. 1981, ch. 714, § 23, p. 2580.)

defendants and their insurers in the large number of malpractice cases that are resolved through settlement. A plaintiff is quite naturally concerned with what a proposed settlement will yield to him personally, and because section 6146 permits an attorney to take only a smaller bite of a settlement, a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery from the lower settlement. Accordingly, the Legislature could reasonably have determined that the provision would serve to reduce malpractice insurance costs.[8]

Second, the Legislature may also have imposed limits on contingency fees in this area as a means of deterring attorneys from either instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements. Although plaintiffs contend that there is no evidence to suggest that unregulated contingency fee agreements pose special problems in the medical malpractice field, plaintiffs themselves stress — in another context — that an unusually high percentage of medical malpractice cases that go to trial result in defense verdicts. While there may be many explanations for this phenomenon, the Legislature could rationally have believed that unregulated contingency fee contracts — calling for potentially huge attorney fee awards if cases are won — play at least some part in leading so many plaintiffs to pursue malpractice claims that ultimately prove unsuccessful. (See, e.g., DiFilippo v. Beck, *supra*, 520 F.Supp. 1009, 1016.) Of course, even when defendants ultimately win such lawsuits, they and their insurers incur considerable expense in defending the action. Thus, by reducing plaintiffs' attorneys' incentive to encourage their clients to pursue marginal claims, section 6146

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[8] Plaintiffs cannot legitimately claim that the Legislature should have restricted the limits on contingency fees *only* to cases of settlement, for the Legislature could reasonably have feared that any such restriction would strongly discourage plaintiffs' attorneys from promoting settlements.

again bears a rational relation to the legislative objective of reducing insurance costs.

Finally, section 6146's limits are rationally related to the MICRA scheme in yet another respect. In order to reduce malpractice insurance costs, MICRA incorporated a number of provisions that place special limits on, or that at least may tend to reduce, a malpractice plaintiff's recovery, provisions that are not applicable to other personal injury plaintiffs. (See, e.g., Civ. Code, §§ 3333.2, subd. (b) [limiting recovery for noneconomic losses to $250,000]; 3333.1, subd. (a) [authorizing admission of evidence of "collateral source benefits"].) The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an "appropriate means of protecting the already diminished compensation" of such plaintiffs from further reduction by high contingency fees. (See Johnson v. St. Vincent Hospital, Inc., *supra*, 404 N.E.2d 585, 602-603.) Accordingly, there is no merit to plaintiffs' initial equal protection claim.[9]

Plaintiffs alternatively contend that the statute violates equal protection because it places limits on the fees that *plaintiffs'* attorneys may charge but imposes no limits on *defense* counsel's fees. As we have already seen, there are a host of statutes —

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[9] As already noted, a number of the medical malpractice reform statutes enacted in the mid-1970s imposed limits on attorney fees which apply only to medical malpractice litigation. Most courts that have addressed equal protection challenges to such provisions have rejected the challenges. (See, e.g., Johnson v. St. Vincent Hospital, Inc., *supra*, 404 N.E.2d 585, 602; DiFilippo v. Beck, *supra*, 520 F.Supp. 1009, 1016.) To our knowledge, only one case has sustained such an attack (Carson v. Maurer (N.H. 1980) 424 A.2d 825, 838-839), and in *Carson* the court applied an "intermediate scrutiny" equal protection standard that is inconsistent with the standard applied by this court in *American Bank* and *Barme*. Indeed, in *American Bank* we noted that of the twenty-six state courts that had passed on equal protection challenges to recent medical malpractice legislation, *Carson* was one of only three that had sustained the challenge. (See 36 Cal.3d at p. 370, fn. 10.)

both in California and in other jurisdictions — that place similar limits on contingency fees without limiting attorney fees that are earned on some other basis. Here, as in those instances, the Legislature could have determined that there was a special need (1) to protect plaintiffs from having their recoveries diminished by high contingency fees, and (2) "to reduce the temptation to adopt improper methods of prosecution which contracts for large fees contingent upon success have sometimes been supposed to encourage." (Calhoun v. Massie, *supra*, 253 U.S. at p. 174.)[10]

Finally, plaintiffs argue that the decreasing-sliding-scale component of section 6146 unconstitutionally discriminates against more seriously injured malpractice victims. They suggest that in light of the lower percentage fee which the statute authorizes for higher recoveries, the provision makes it more difficult to obtain an attorney who will be willing to undertake the additional effort required to obtain such awards. As we have already noted, however, the Legislature could reasonably have concluded that the sliding-scale approach in fact produces more equitable fees than the traditional flat contingency fee, helping to ensure that an attorney does not obtain a "windfall" simply because his client is very seriously injured and guaranteeing that the most seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf.[11]

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[10] The dissent's suggestion that a statute which draws a distinction between plaintiffs' and defendants' attorney fees violates the First Amendment's ban on "content discrimination" (*post*, pp. ___),* not only is unsupported by any authority, but is also quite short-sighted. Numerous statutes contain provisions authorizing successful plaintiffs to recover attorney fees under circumstances in which successful defendants may not so recover. (See, e.g., Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 417-422 [federal civil rights action]; Code Civ. Proc., § 1021.5 [private attorney general action].) Surely, the dissent does not intend to suggest that all such statutes are unconstitutional.

* Typed opinion, pp. 12-16.

[11] The case of Echlin v. Superior Court (1939) 13 Cal.2d 368, provides no support for plaintiff's equal protection contention. In *Echlin*, we addressed a

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Plaintiffs' final claim is that section 6146 violates the separation of powers doctrine. They argue that in light of this court's inherent power to review attorney fee contracts and to prevent overreaching and unfairness (see, e.g., Bushman v. State Bar (1974) 11 Cal.3d 558, 563-564), the question of the appropriateness of attorney fees is a matter committed solely to the judicial branch. But, as we have seen, legislative bodies have imposed limits on attorney fees in a variety of fields throughout our history. Applicable California authority expressly refutes the claim that the Legislature has no power to act in this setting. (See Estate of Goodrich, *supra*, 6 Cal.App. 730, 732. See generally Brydonjack v. State Bar (1929) 208 Cal. 439, 443.)[12]

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provision which purported to give attorneys retained on a contingency basis greater rights vis-a-vis their clients than other attorneys, requiring a client who employed a lawyer under a contingency fee contract to pay the lawyer a sum fixed by the court before the client could dismiss the lawyer and replace him with another. The *Echlin* court invalidated the provision, finding that it was arbitrary to provide this special advantage to attorneys employed on contingency fees. That holding obviously does not suggest that a statute which limits the fees an attorney may charge when he represents a client on a contingency basis is constitutionally suspect or subject to any special, "rigorous" scrutiny.

[12] In Heller v. Frankston (Pa. Comm. 1983) 464 A.2d 581, 584-587, an intermediate appellate court in Pennsylvania invalidated a statutory limitation on attorney fees contained in Pennsylvania's medical malpractice legislation as a violation of the separation of powers doctrine. In so holding, however, the court took no note of the numerous federal and state decisions upholding statutory limits on contingency fees in a variety of settings. The Pennsylvania Supreme Court took over the *Heller* case and ultimately affirmed the judgment on other grounds, without reaching the separation of powers issue. (Heller v. Frankston (Pa. 1984) 475 A.2d 1291.)

Accordingly, we conclude that plaintiffs' constitutional challenge to section 6146 is unfounded. The order appealed from is affirmed.

KAUS, J.

WE CONCUR:

BROUSSARD, J.
GRODIN, J.
LUCAS, J.

ROA v. LODI MEDICAL GROUP, INC.
S.F. 24435

DISSENTING OPINION BY BIRD, C.J.

I strongly dissent.

Unlike other sections of the Medical Injury Compensation Reform Act (MICRA) which have been upheld by this court, section 6146 of the Business and Professions Code (hereafter section 6146) implicates the fairness of the judicial process itself. (Compare American Bank & Trust Co. v. Community Hospital (1984) 36 Cal.3d 359 [upholding periodic payment provision]; Barme v. Wood (1984) 37 Cal.3d 174 [upholding elimination of collateral source subrogation rights].) In effect, section 6146 prohibits severely injured victims of medical negligence from paying the general market rate for legal services, while permitting defendants to pay whatever is necessary to obtain high quality representation.

Out of practical necessity, virtually all plaintiffs use contingent fee arrangements in medical malpractice cases. (See Reder, *Contingent Fees in Litigation with Special Reference to Medical Malpractice*, in The Economics of Medical Malpractice (Rottenberg edit. 1978) p. 224 [hereafter *Contingent Fees*]; see also U.S. Dept. of Health, Ed. & Welf., Rep. of Secretary's Com. on Medical Malpractice (1973) p. 32 [hereafter *HEW Report*].) In fact, for clients of limited means "the contingent fee arrangement offers the only realistic hope of establishing a legal claim." (Fracasse v. Brent (1972) 6 Cal.3d 784, 792; see also Aronson, *Attorney Client-Fee Arrangements: Regulation and Review* (1982) 68 A.B.A. J. 284, 286; *Contingent Fees, supra*, at p. 231; Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation* (1970) 22 Stan.L.Rev. 1125, 1125-1126; Ranii, *ABA Report Suggests Changes in Tort System*, National Law J.

(12/24/84) p. 6, col. 1; *ABA Agenda: Shepard Outlines His Goals*, 70 A.B.A. J. (Oct. 1984) p. 38 ["The contingent fee truly is the key to the courthouse for many, many of our citizens."].)

Section 6146 imposes heavy burdens on the ability of severely injured plaintiffs to obtain adequate legal representation. it sets forth a sliding scale of fee limits — the greater the recovery, the lower the allowable percentage. The effect of this approach is to impose drastically low limits on fees in precisely those cases which require a large recovery to make the plaintiff economically whole. For example, in a case involving a $1 million recovery, the allowable rate would be about 15 percent, less than half of the 33-⅓ percent rate that is generally available outside the medical malpractice field. (See generally, *HEW Report, supra,* at p. 32; see also Cal. Auditor General, The Medical Malpractice Insurance Crisis in California (1975) p. 27 [hereafter *Report of the Auditor General*].)

Other provisions of MICRA interact with section 6146 to further discourage attorneys from representing severely injured plaintiffs. The collateral source provision (Civ. Code, § 3333.1, subd. (a)) can substantially reduce the damage award, and thus the contingent fee, without decreasing the attorney's workload.[1] The periodic payment provision (Code Civ. Proc., § 667.7) may have the same effect, and, in addition, could delay the attorney's compensation for years.[2] Further,

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[1] Civil Code section 3333.1, subdivision (a) permits the introduction of evidence concerning collateral source payments, such as disability insurance, to medical malpractice plaintiffs. The jury may then reduce the damage award by that amount. This provision does not lessen the plaintiff attorneys' job of proving negligence, causation, and damages.

[2] Section 667.7 of the Code of Civil Procedure provides that in cases involving awards of $50,000 or more in "future damages," the court must, upon request of either party, order that this portion of the award be paid in periodic install-

the $250,000 limit on noneconomic damages (Civ. Code, § 3333.2) sharply reduces the recovery without relieving the attorney of the most difficult aspects of the malpractice action — proving negligence and causation.[3]

Since section 6146 affects only medical malpractice cases, attorneys may avoid these problems by refusing to represent medical malpractice victims. Only those lawyers not sufficiently competent or well-established to attract unrestricted business have any financial incentive to represent a severely injured medical malpractice victim. (See *Contingent Fees, supra,* at p. 219.)[4]

Section 6146 hampers a victim's ability to obtain high quality legal representation precisely in those cases where such representation is most essential. Defendants can be expected to concentrate their legal resources on the potential high recovery cases. The statute prohibits plaintiffs from responding in kind. Hence, the legal contest becomes a lopsided mismatch with tort victims on the losing end.

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ments. If the plaintiff dies before receiving the entire award, the remainder, with the exception of damages for loss of future earnings, reverts to the defendant. (See American Bank & Trust Co. v. Community Hospital, *supra,* 36 Cal.3d at p. 368, fn. 8.)

The precise impact of section 667.7 on attorney fees is open to question, since the statute does not explicitly preclude the possibility that the attorney fees could be paid in a lump sum at the time of judgment.

[3] It is noteworthy that 60 percent of lawyers polled recently, including both plaintiff and defense attorneys, opposed a medical malpractice bill which will be introduced in the 99th Congress. Seventy-nine percent of those opposed to the bill felt that it would unfairly restrict the scope of damages an injured patient can recover. (Reskin, *Lawyers Oppose Medical Malpractice Bill,* 71 A.B.A. (Jan. 1985), p. 40.)

[4] "[A] limit on the percentage that a lawyer may retain of a gross recovery is a 100 percent marginal tax on earnings per dollar of gross recovery." (*Contingent Fees, supra,* at p. 219, fn. 24.) Obviously, such a tax creates a powerful disincentive to work on covered cases.

This problem is aggravated by the fact that medical malpractice plaintiffs are even more in need of high quality legal representation than other personal injury plaintiffs. Even MICRA's principal sponsor has acknowledged that "a malpractice case is extremely difficult to prove, demands a great deal of research into causal factors and exhausts a tremendous amount of time on the part of the attorney." (Keene, *California's Medical Malpractice Crisis*, in A Legislator's Guide to the Medical Malpractice Issue (Warren & Merritt edits. 1976) pp. 29-30 [hereafter *California's Medical Malpractice Crisis*].)

Further, the risk of a zero recovery is high, and the fees collected in successful cases must also compensate the attorney for his or her work on the unsuccessful ones. (See, e.g., *Auditor General's Report, supra*, at p. 28 [50 percent of medical malpractice cases are disposed of with no recovery]; *Contingent Fees, supra*, at p. 227 [of the malpractice claims that go to trial, 60 percent obtain zero gross recovery].)[5]

Plaintiffs advance three constitutional arguments. They argue that section 6146: (1) infringes on their right to petition the government for redress of grievances and discriminates between litigants according to the content of the views they seek to present to the courts; (2) violates due process by infringing on the right of malpractice victims to retain counsel and by exacerbating the conflict of interest between an attorney

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[5] The majority imply that the high rate of zero recovery in medical malpractice cases is due to an inordinate number of frivolous or meritless claims. (Maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 18].) The more likely explanation is that there is a "salient difference between litigation for medical malpractice and other forms of accident liability." (Green, *Medical Malpractice and the Propensity to Litigate*, in The Economics of Medical Malpractice, *supra*, at p. 194 [hereafter *Propensity to Litigate*].) Modern medicine is highly complex and technical, and there is often a significant lag time between the date of the wrongful act and the date an injury is perceived. These factors present special difficulties in gathering evidence and proving negligence in medical malpractice cases. (*Id.*, at pp. 196-197.)

and client; and (3) violates equal protection by arbitrarily applying attorney fee limitations only in medical malpractice cases, only to the *plaintiffs* in those cases, and in a manner particularly burdensome to severely injured malpractice victims with limited means.

I.

Plaintiffs urge that the fee limits imposed by section 6146 infringe on their constitutional right to petition the government for redress of grievances. They contend that their ability to obtain competent legal representation, which is essential for the effective prosecution of a medical malpractice complaint, is heavily burdened. Further, they suggest that selective imposition of restrictions on "person[s] *seeking* damages" for injuries due to medical malpractice (§ 6146, emphasis added) impermissibly discriminates among litigants according to the content of the views they wish to present to the courts. *Only plaintiffs* are prohibited from hiring attorneys at the market rate, while defendants are free to pay any amount — by contingent fee or otherwise — which may be necessary to obtain quality representation.[6]

[6] The majority dismiss this contention by analogizing to California's ban on contingent fees for legislative lobbyists. (Maj. opn., *ante*, at p. ___, fn. 5 [typed maj. opn. at p. 9]; Gov. Code, § 86205, subd. (f).) This analogy is not persuasive for several reasons. First, there is no evidence that such a ban selectively disadvantages any interest group in the political process. I would hope that a total ban on contingent attorney fees in malpractice or personal injury litigation would raise concerns even for the majority, since it would clearly prevent all but wealthy victims from pursuing claims. Second, the term "contingent fee" as used in the context of this case is somewhat different from its use in the lobbyist statute. Unlike attorneys, lobbyists do not normally vie to recover a specific sum of money, a percentage of which could readily be paid to them. Third, the ban on contingent fees for lobbyists applies across the board to representatives of *all* viewpoints. Surely, the majority would not argue that a ban on contingent fees only for those who lobby on behalf of medical malpractice victims would be permissible.

The right of petition is protected by the 1st and 14th Amendments to the United States Constitution and article I, section 3 of the California Constitution. It encompasses the right of access to the courts for the resolution of civil disputes between private parties. (See, e.g., California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510-511; United Transportation Union v. Michigan Bar (1971) 401 U.S. 576, 578-579; City of Long Beach v. Bozek (1982) 31 Cal.3d 527, 532-534, vacated [on other grounds] (1983) 459 U.S. 1095, opn. reiterated on remand (1983) 33 Cal.3d 727.)

Litigants are entitled to petition the courts not only to advocate changes in public policy, but also to obtain monetary compensation. (See, e.g., Mine Workers v. Illinois Bar Assn. (1967) 389 U.S. 217, 223; Railroad Trainmen v. Virginia Bar (1964) 377 U.S. 1, 8; City of Long Beach v. Bozek, *supra*, 31 Cal.3d at p. 534; Payne v. Superior Court (1976) 17 Cal.3d 908, 914.)

As a general matter, the Legislature may regulate commercial activities. (See, e.g., Williamson v. Lee Optical Co. (1955) 348 U.S. 483, 488; United States Steel Corp. v. Public Utilities Com. (1981) 29 Cal.3d 603, 613.) However, economic activity that is essential to the effective exercise of a First Amendment right may be restricted *only* where necessary to serve a compelling governmental interest. For example, in Buckley v. Valeo (1976) 424 U.S. 1, 51-54, the Supreme Court struck down a statutory limit on the amount a political candidate could spend on his campaign. The First Amendment was implicated because political advocacy required the expenditure of funds to pay for the use of the electronic media. (*Id.*, at pp. 35-39; see also Citizens Against Rent Control v. Berkeley (1981) 454 U.S. 290, 296, fn.5.) Here, in the judicial context, the expenditure of money for attorney fees is no less essential to the exercise of First Amendment rights.

In what appears to be the only reported decision that directly addresses a First Amendment challenge, a federal district court issued a preliminary injunction barring the enforcement of a limit on attorney fees in cases where veterans seek death and disability benefits. (See National Ass'n of Radiation Survivors v. Walters (N.D.Cal. 1984) 589 F.Supp. 1302, 1323-1327, 1329, Walters v. National Assoc. of Rad. Survivors (1984) 105 S.Ct. 588 [prob. jurisdiction noted], 105 S.Ct. 11 [stay granted by Rehnquist, J.], 105 S.Ct. 238 [request to vacate stay denied by court] [hereafter *Walters*].)[7]

The *Walters* opinion warrants extensive quotation. "While the Supreme Court has never directly addressed the question presented here, its cases establish the principle that the First Amendment rights to petition, association and speech protect efforts by organizations and individuals to obtain effective legal representation of their constituents or themselves. In particular, it has held that the First Amendment rights of petition, speech, and association protect union members' efforts to, through their union, advise injured workers to obtain legal advice and to recommend specific lawyers [citation]; a union's employment of a salaried attorney to represent its members in workers' compensation litigation [citation]; and to employ counsel to represent members, to furnish names of injured members to attorneys, and to accept compensation for soliciting clients for counsel [citations] . . . . The Court has explicitly declared that the principle underlying this series of cases should be applied broadly to protect First Amendment rights: [¶] '. . . . The common thread running through our decisions . . .

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[7] The fee constraint in *Walters*, a ten dollar maximum, is drastically lower than the limits allowed by section 6146. However, it may be argued that the limit in *Walters* was enacted to protect veterans from overreaching when they are dealing with a government agency, the Veteran's Administration, which has as its very purpose the advancement of veterans' interests.

is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.' *United Transportation Union,* [*supra,*] 401 U.S. at 585-86, 91 S.Ct. at 1082-83. [¶] *It is evident that the First Amendment protects individuals' rights to obtain the adequate legal representation necessary to ensure their rights of petition, access to the courts, and association, just as it protects organizations' rights to such representation.* As the Supreme Court made clear in Bates v. State Bar of Arizona, 433 U.S. 350, 376, 97 S.Ct. 2691, 2705 n.32, 53 L.Ed.2d 810 n.32 (1977) the principle underlying the NAACP and union solicitation cases extends to individual efforts to obtain legal assistance. The Court was protecting the organization's [*sic*] efforts because the organizations were working on behalf of their members: [¶] 'Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. *This concern applies with at least as much force to aggrieved individuals as it does to groups.*' 433 U.S. at 376 n.32, 97 S.Ct. at 2705 n.32. . . ." (*Walters, supra,* 589 F.Supp. at pp. 1324-1325, emphasis added.)

Compare the principal cases relied upon by the majority. They were all decided *before 1930.* (See maj. opn., *ante,* at p. ___ [typed maj. opn. at pp. 7-9].) *None addressed the right to petition.*[8] This omission is not surprising considering that,

[8]The majority place particular reliance on Calhoun v. Massie (1920) 253 U.S. 170, in which the Supreme Court concluded that "[t]he constitutionality of [attorney fee regulation] . . . resembling in its nature the exercise of the police power, has long been settled." (*Id.,* at p. 174, quoted by the majority, *ante,* at p. ___ [typed maj. opn. at pp. 8-9].)

In relying on this line of reasoning, the majority ignore the more recently articulated principle that laws which actually affect the exercise of First Amend-

as one commentator has argued, the First Amendment was largely forgotten at that time. (See Rabban, *The First Amendment in its Forgotten Years* (1981) 90 Yale L.J. 514, 521 & fn. 21.)

By contrast, the cases relied upon by plaintiffs were all decided after the United States Supreme Court had taken on the task of interpreting and enforcing the guarantees of free speech and petition. (See, e.g., cases cited *ante*, at p. ___ [typed dis. opn. at pp. 7-9].) Judge Patel's opinion in *Walters*, *supra*, 589 F.Supp. 1302, carefully analyzed this body of First Amendment jurisprudence and concluded that an attorney fee limit infringed on the right of petition. I believe her conclusion is sound.

Since representation by counsel is essential to the effective exercise of an individual's First Amendment rights to petition and to access, the right to obtain counsel can only be restricted where necessary to achieve a compelling state interest.

The attorney-fee limitation should be subjected to particularly vigorous scrutiny since it also runs afoul of the constitutional ban on content discrimination. In regulating the exercise of First Amendment rights, the government may not pick and choose what views may be heard. (See Police Department of Chicago v. Mosley (1972) 408 U.S. 92, 95-96; Environmental Planning & Information Council v. Superior Court (1984) 36 Cal.3d 188, 197.)

Section 6146 facially discriminates against persons desiring to prove medical negligence. It restricts only the fees that may be paid by "any person *seeking* damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence . . . ."

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ment freedoms cannot be sustained merely because they deal with some evil within the state's legislative competence. (Mine Workers v. Illinois Bar Assn., *supra*, 389 U.S. at p. 222.)

(Emphasis added.) It leaves intact a defendant's right to pay fees — contingent or otherwise — of any amount consistent with general law.[9]

Two justifications are advanced in support of section 6146. The first is that the limits are necessary to ensure that plaintiffs receive a greater percentage of the recovery. The second is that the statute serves the overall purpose of MICRA — the preservation of medical malpractice insurance. Neither of these justifications withstands strict scrutiny.

Allowing plaintiffs to retain a greater percentage of their recovery is a legitimate interest. However, it is *not* a compelling

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[9] If the statute also restricted the use of contingent fees by defendants, it would still be vulnerable to a challenge. Such additional restrictions would have no practical effect since defendants utilize hourly or per diem fee arrangements.

It is noteworthy that the disparate treatment of plaintiffs and defendants has led some commentators to conclude that the fee restrictions were specifically intended to restrict plaintiffs' access to the courts. (See Jenkins & Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge* (1979) 52 So.Cal. L.Rev. 829, 944, fn. 696 [hereafter *California's MICRA*]; see also *Contingent Fees, supra*, at p. 215 ["[T]he effect of limiting attorney fees is, quite intentionally, to discourage use of attorney time in prosecuting malpractice claims."].) This argument appears particularly compelling when the fee restrictions are viewed in the context of other MICRA provisions, which forthrightly provide special relief to healthcare providers and their insurers at the expense of medical malpractice victims. (See, e.g., Civ. Code, § 3333.2 [limit on noneconomic damages in medical malpractice actions]; Civ. Code, § 3333.1 [abrogation of the collateral-source rule in medical malpractice actions]; Code Civ. Proc., § 667.7 [periodic payment of medical malpractice judgments].)

Normally, the question of legislative motivation does not arise where — as here — a restriction is facially discriminatory. Such enactments are subject to strict scrutiny. However, since the majority have declined to recognize this problem (see maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 20]), I point out this additional difficulty. Some distinguished commentators have suggested that facially neutral restrictions enacted for the purpose of restricting content should be subjected to the strictest form of scrutiny. (See, e.g., Tribe, American Constitutional Law (1978) 591-594; Ely, Democracy and Distrust (1980) pp. 111-115.)

one. As explained by the court in *Walters*, such a paternalistic argument is disfavored in the context of the First Amendment. (See *Walters*, *supra*, 589 F.Supp. at p. 1327.) It is entirely inappropriate for the state to "protect" an individual by suppressing his or her exercise of a First Amendment right.

Moreover, section 6146 is not necessary to protect a plaintiff's recovery. Section 6146 will often operate to force the early settlement of meritorious claims, resulting in a *reduction* in a plaintiff's recovery in many cases. (See *post*, at pp. ___-___ [typed dis. opn. at pp. 22-27].) Curiously, in cases involving serious injuries with potentially large recoveries, attorneys may be discouraged from taking meritorious cases to trial even though to do so might significantly increase the plaintiff's recovery. In cases involving smaller potential recoveries, section 6146 may actually *increase* the attorney's contingent fee since the fee schedule set out in section 6146 can be expected "to provide a floor, as well as a ceiling, on the percentage rate charged." (Comment, *Of Ethics and Economics: Contingent Percentage Fees for Legal Services* (1983) 16 Akron L.Rev. 747, 755 [hereafter *Ethics and Economics*].)

It is also argued that section 6146 serves MICRA's overall purpose of preserving medical malpractice insurance. In this view, limits on contingent fees will reduce the amount of damages that insurers are required to pay. Assuming arguendo that the preservation of medical malpractice premiums is a compelling state interest, the attorney fee limits are by no means necessary to serve that interest.

Section 6146 will provide little, if any, relief to insurers. Since attorney fees are paid out of the *plaintiff's* recovery, fee limitations merely reapportion the award between the plaintiff and his or her attorney. Juries are prohibited from considering attorney fees in making damage awards. (Bauguess v. Paine (1978) 22 Cal.3d 626, 634.) The available evidence indicates that this prohibition is effective. (See *California's MICRA*, *supra*, at p. 943, and sources cited therein.)

Section 6146 can provide relief to defendants and their insurers only by forcing plaintiffs to settle claims for amounts far below their actual value and/or by reducing the number of claims filed. Indeed, at the time that MICRA was enacted, the Auditor General pointed out that "[u]nless the amount of medical malpractice settlements continue[s] to increase in the future there will be *little if any effect* on medical malpractice rates as a result of limitations imposed on attorney contingency fees." (*Report of the Auditor General, supra,* at p. 30, emphasis added.) Indeed, because section 6146 provides defense attorneys with an incentive to run up costs in cases with potentially large recoveries (see *post,* p. ___ [typed dis. opn. at pp. 28-29], section 6146 may be expected to *increase* malpractice premiums.

Section 6146 significantly infringes on plaintiff's First Amendment right to petition and does so based on the content of a plaintiff's claim. Therefore, it must be shown to be necessary to achieve a compelling state interest. Defendant has not met this burden. Accordingly, section 6146 is invalid.

II.

Next, plaintiffs contend that section 6146 violates plaintiffs' right to due process of law. "The due process clauses, federal and state, are the most basic substantive checks on government's power to act unfairly or oppressively." (Hale v. Morgan (1978) 22 Cal.3d 388, 398.) Due process requires that legislation be "reasonable and proper," not "arbitrary and oppressive." (*Id.*, at p. 399.) The limits imposed by section 6146 must be rationally related to the Legislature's purposes in enacting the statute.

The majority conclude that limiting the compensation that plaintiffs' attorney may receive does not violate due process because it "does not in any way abrogate the right to retain

counsel." (Maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 6].) However, section 6146 *does* significantly interfere with the right of certain victims of medical malpractice to retain counsel. (*Ante*, at p. ___ [typed dis. opn. at pp. 2-9].) Further, it exacerbates the conflict of interest between plaintiffs and their attorneys inherent in the contingent fee arrangement.

In support of their holding, the majority cite a number of existing attorney-fee limits which have withstood legal challenge. (Maj. opn., *ante*, at p. ___ [typed maj. opn. at pp. 6-7].) However, these limits can in no way be compared to the severe limits imposed by section 6146.

First, the majority note that attorney fees are legislatively regulated in California in both worker compensation proceedings and in probate matters. As one commentator has noted, these schemes are easily distinguishable from section 6146. (*California's MICRA*, *supra*, at p. 945.) Under the Workers' Compensation Act, injured parties do not have to prove negligence. (Lab. Code, § 3600.) Hence, the attorney faces far less risk of a zero recovery. Moreover, the statute provides for "[a] reasonable attorney's fee," which allows a judge the flexibility to fix a fee which takes into consideration the complexity of the case and the time and effort of the attorney. (Lab. Code, § 4903.) Under the Probate Code, an attorney is compensated for the actual work done for the estate. (Prob. Code, §§ 900, 910, 911.) The only way an attorney could fail to receive compensation is if he or she does no work. The Probate Code also allows a judge to recognize an attorney's extraordinary services by an award of fees. (Prob. Code, § 910, subd. (a).) In short, fee restrictions in the workers compensation and probate contexts are not likely to discourage attorneys from working in those fields, since the legal work is relatively simple, the risks are low and compensation is available which is commensurate to the services performed.

Contrast this situation with that of the plaintiff's attorney in a malpractice action with a contingent fee arrangement. The attorney will receive no compensation unless there is a recovery in the case. One study indicates that over 400 attorney hours are spent on the average malpractice case which results in a "zero recovery" after trial. (*Contingent Fees, supra,* at p. 218, fn. 22.) Faced with the combined effect of the fee limitation and other MICRA provisions (e.g., the collateral source provisions (§ 3333.1), the $250,000 ceiling on noneconomic damages (Civ. Code, § 3333.2), and the periodic installment provision (Code Civ. Proc., § 667.7), many attorneys can be expected to cease to represent malpractice victims with valid claims. As a result, the most severely injured clients may be unable to secure representation, especially if their cases involve complex or difficult factual issues, problems of proof, or expensive expert testimony.

The majority stress that in some states (e.g., New Jersey and New York) limits on the contingent fees available to attorneys in *all* personal injury action have been upheld. (Maj. opn., *ante,* at p. ___ [typed maj. opn. at p. 7].) However, rather than lending support to the majority's position, reference to the New Jersey and New York schemes highlight two of the most pernicious aspects of section 6146.

First, section 6146 singles out and imposes a burden on only one narrow subclass of personal injury victims. Attorneys may still find ample unrestricted work elsewhere. When the risks and cost associated with general personal injury work are not as great as for medical malpractice, and the potential compensation is much greater, common sense tells us that attorneys will abandon the medical malpractice field. By contrast, the New Jersey and New York schemes restrict broad fields of practice, leaving attorneys little room for escape. (See, e.g., American Trial Lawyers Ass'n v. New Jersey S. Ct., (N.J. 1974) 330 A.2d 350, 351, fn. 3 [all tort actions other

than subrogation claims]; Gair v. Peck (N.Y. 1959) 160 N.E.2d 43, 45, fn. 1 [all personal injury and wrongful death actions].)[10]

Second, unlike the New Jersey and New York schemes, section 6146 has no provision for higher fees in exceptionally difficult cases. Section 6146 would prohibit a plaintiff from exceeding the limits even where the difficulty of his or her case is so great that a lawyer could not be retained at the specified maximums. (Compare American Trial Lawyers Ass'n v. New Jersey S. Ct., *supra*, 316 A.2d 19, 28 [upholding contingent fee limits in part because exceptions are permitted in special circumstances]; Gair v. Peck, *supra*, 160 N.E.2d at p. 53 [same].)

Similarly, the attorney fee limits imposed for actions brought under the Federal Tort Claims Act are distinguishable from the limits imposed by section 6146. The Federal Tort Claims Act applies only to *claims against the government*. Because of federal concepts of sovereign immunity, the government has

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[10] The majority also state that California's scheme is "generous" in comparison to that of New Jersey. (Maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 10].) The New Jersey scheme was amended in 1976, and the new maximum permissible fees are comparable to those provided by section 6146. As amended, the New Jersey rule provides: 50 percent of the first $1000, 40 percent of the next $2000, 33-⅓ percent of the next $47,000, 25 percent of the next $50,000, 20 percent of the next $150,000, and 10 percent of any amount over $250,000. Under the New Jersey schedule, the fee for the settlement in this case would have been approximately $83,600, only $7,200 less than was awarded in this case. More importantly, New Jersey's rule allows attorney fees to be awarded in excess of the limits in exceptional cases. (See American Trial Lawyers Ass'n v. New Jersey S. Ct., *supra*, 316 A.2d at p. 28.)

The maximum percentages prescribed under the federal statutes which limit attorney fees would allow attorney fees of over $100,000 in this case. (See 28 U.S.C. § 2678 [Federal Tort Claims Act provides for a fee of 25 percent after court action and 20 percent of any recovery obtained prior to such action]; 42 U.S.C. § 406(b)(1) [Social Security Act provides for reasonable fees not in excess of 25 percent of plaintiff's recovery].) In any event, as discussed, *post*, (dis. opn. at p. ___ [typed dis. opn. at p. 22] these statutory schemes are distinguishable from section 6146.

been free to prohibit any tort claims against itself. While such claims are now allowed, some limitations on those claims have been justified as reasonable exercises of the police power. By contrast, section 6146 operates to limit the right of individuals to contract for representation in actions between private parties. The limitations cannot be justified by references to "protect[ing] the Treasury from frauds and imposition." (Maj. opn., *ante*, at p. ___ [typed opn. at p. 8], quoting Calhoun v. Massie, *supra*, 253 U.S. at p. 174.) Instead, section 6146 directly interferes with the judicial process by imposing an unfair disadvantage on one party in a legal dispute.

Section 6146 violates due process because it is not sufficiently related to the purposes it was enacted to achieve. Instead of protecting plaintiffs' recoveries, it operates to reduce them. Instead of reducing the number of frivolous claims, it restricts the number of meritorious claims by limiting medical malpractice victims' access to adequate representation.

Simple calculations indicate that section 6146 will often operate to discourage litigation in a manner which results in a *reduction* rather than an increase in a plaintiff's recovery. An example serves to illustrate the point. This example assumes a medical malpractice case which would result in a $250,000 verdict after trial.

Studies indicate that plaintiffs who settle before trial receive approximately 75 percent of their potential verdict. (Danzon & Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims* (1983) 12 J. Legal Stud. 345, 375.) Plaintiffs and amicae note that, prior to MICRA, most plaintiff attorneys employed contingent fee agreements in which the attorney received a greater percentage of the recovery if the case proceeded to trial than if it settled before trial — typically

25 percent to 33 percent if the case settled and 40 percent or more if the case went to trial.[11]

Prior to the enactment of section 6146, the $250,000 hypothetical case which went to trial would yield approximately $150,000 for the plaintiff and $100,000 for the plaintiff's attorney, assuming that the attorney received a 40 percent contingent fee. If the same case had settled prior to trial for 75 percent of its value or $187,500, the plaintiff would have received approximately $125,062 and the plaintiff's attorney $62,437, assuming a 33-⅓ percent contingent fee. Since the increase in compensation for the attorney might be over $37,000, the plaintiff's attorney obviously had a strong incentive prior to MICRA to ensure that the victim was more fully compensated for his or her injury.

Under section 6146 a $250,000 verdict would yield $183,350 to the plaintiff and $66,650 to the plaintiff's attorney, assuming the attorney received the maximum fee permitted by section 6146.[12] If the case settled prior to trial for 75 percent of its value or $187,500, plaintiff's attorney might charge according to the guidelines of section 6146 rather than his or her former fee schedule to avoid the loss of income caused by MICRA. Under this scenario, plaintiff would receive $128,975 and his attorney $58,525. (See Note, *Ethics and Economics, supra,* 16 Akron L. Rev. at p. 755 ["While [maximum fees schedules] are intended to eliminate the disproportionate fee an attorney might take from large recoveries, in practice they

[11] In this case, the plaintiffs and their attorneys had contracted for a 25 percent contingent fee. The trial court expressly noted that that fee was "reasonable," and would have been awarded were it not for the restrictions imposed by section 6146.

[12] This hypothetical does not take into account the possible reduction in recovery which results from the application of Civil Code section 3333.1, which abrogates the collateral source rule. When section 3333.1 is applied, plaintiff's recovery will be even smaller, with a corresponding reduction in plaintiff's attorney's fee.

tend to provide a floor, as well as a ceiling, on the percentage rate charged"].)

Hence, after MICRA, if the case settles before trial, the attorney's compensation is not significantly less than if the case had gone to trial. However, the plaintiff's recovery is reduced by almost $55,000. The plaintiff in a malpractice case which settles before trial may recover little more than half his or her actual damages — a smaller percentage and less in absolute terms than would have been received prior to the enactment of section 6146.

This illustration demonstrates how section 6146 exacerbates the conflict of interest between plaintiffs and their attorneys in contingent fee arrangements. (See maj. opn., *ante*, at p. ___ [typed maj. opn. at pp. 12-13.) After MICRA, although a plaintiff might significantly increase his or her recovery by going to trial, the marginal increase in attorney fees might not cover the expenses involved in producing expert witnesses marshalling exhibits, and conducting the trial itself. The pressure on a plaintiff's attorney to settle a meritorious case before trial is overwhelming.

Thus, section 6146 will produce a greater number of settlements with lower recoveries. However, it will do so at a heavy price both to the injured plaintiff and his or her relationship with the attorney. Rather than helping the malpractice victim as the majority contend, section 6146 will often result in a *smaller* recovery for the plaintiff and a significant ethical dilemma for the attorney. "Limits on contingent fees decrease settlement size, increase the likelihood that a case is dropped, and decrease the likelihood of litigation to verdict. . . . [F]ee constraints will limit expenditure on litigation at the cost of reduced compensation to plaintiffs." (Danzon & Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice*

Claims, supra, 12 J. Legal Stud. at p. 375.) These results are exactly contrary to those forecast by the majority.[13]

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[13] As the following table demonstrates, a reduced recovery for a plaintiff is likely whether the value of the case is large or small. All calculations are based on a pre-MICRA fee schedule of 40 percent to the attorney after trial, and 33-⅓ percent to the attorney if the case is settled before trial. Post-MICRA calculations assume the application of the maximum fees allowable under section 6146.

TOTAL DAMAGES		Pre-MICRA After Trial	Pre-MICRA Settled Before Trial	Post-MICRA After Trial	Post-MICRA Settled Before Trial
$1,000,000	Total Paid	$1,000,000	$750,000	$750,000*	$562,500
(including $500,000 noneconomic damages)	Plaintiff's Recovery	$ 600,000	$500,250	$633,350	$464,600
	Attorney's Fee	$ 400,000 (40%)	$249,750 (33-⅓%)	$116,650 (15.5%)	$ 97,900 (17.5%)
$ 50,000	Total Paid	$ 50,000	$ 37,500	$ 50,000	$ 37,500
	Plaintiff's Recovery	$ 30,000	$ 25,012	$ 30,000	$ 22,500
	Attorney's Fee	$ 20,000 (40%)	$ 12,487 (33-⅓%)	$ 20,000 (40%)	$ 15,000 (40%)

Thus, the injured plaintiff in a case with $1 million in damages who settles before trial may receive $97,400 less under section 6146 than he or she would have before MICRA. Plaintiff's attorney's fee may be reduced by over $300,000,

As for reducing the number of claims filed, it appears that health care providers believed prior to MICRA that the use of contingent fee arrangements in medical malpractice cases encouraged the filing of claims which would otherwise not have been made. (See Rottenberg, Introduction, in The Economics of Medical Malpractice, *supra*, p. 7; Comment, *Recent Medical Malpractice Legislation — A First Checkup, supra*, 50 tulane L.Rev. at p. 670.)

In at least one respect, the health care providers were probably right. "[C]ontingent fees have indeed 'contributed' to the recent [medical malpractice] crisis to one limited, but very important extent; *i.e.*, they have opened the courthouse door for those who could not otherwise afford an attorney." (Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective* (1975) 3 Western St. U.L.Rev. 27, 36.)

While discouraging frivolous and meritless suits is a legitimate state interest, there is no evidence that the number of frivolous claims in the medical malpractice field is high, or that such claims contribute to the cost of medical malpractice premiums. On the contrary, the difficulty in proving medical malpractice and the high risk of zero recovery make attorneys very selective about the cases they are willing to pursue. (See Comment, *Recent Medical Malpractice Legislation — A First Checkup, supra*, 50 Tulane L.Rev. at p. 671; Rottenberg, *Introduction*, in The Economics of Medical Malpractice, *supra*,

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to less than 25% of the former available fee. It is little wonder attorneys may be unwilling to pursue such claims at all.

The injured plaintiff in a case with a small recovery ($50,000) may receive $5,625 less under section 6146 than prior to MICRA. The plaintiff's attorney in the small recovery may receive a greater percentage of the recovery *after* MICRA, because of the "floor" effect of section 6146. (See *Ethics and Economics, supra*, 16 Akron L.Rev. at p. 755.)

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*Civil Code section 3333.2 imposes a $250,000 ceiling on noneconomic damages.

at pp. 7-8; *Propensity to Litigate, supra,* at pp. 194-197.) Even insurers have acknowledged that attorneys reject the vast majority of malpractice claims they see. (See, e.g., *Criteria Lawyers Use in Accepting or Rejecting Medical Malpractice Cases,* Malpractice Digest [published by St. Paul Fire and Marine Insurance Company for its medical liability insurance policyholders], (Sept/Oct 1978) at p. 2; see generally *Propensity to Litigate, supra,* at p. 194.)

The absence of any evidence that prior to the enactment of MICRA there was an inordinate number of frivolous medical malpractice claims filed strongly suggests that section 6146 actually operates to discourage the filing of *meritorious* claims. The attempt to reduce malpractice premiums by reducing the number of meritorious malpractice claims filed is exactly the sort of "arbitrary and oppressive" legislative action which the due process guarantees must operate to prevent. (See Hale v. Morgan *supra,* 22 Cal.3d at pp. 398-399.)

In fact, rather than *lowering* premiums, section 6146 may work to *increase* them. While section 6146 discourages attorneys from representing medical malpractice plaintiffs in cases involving extensive damages, it encourages defense attorneys to devote their utmost time to these very cases. While the costs involved encourage plaintiffs to settle cases, defense attorneys, who are paid on a per diem basis, can afford to undertake extensive and costly discovery prior to settlement. Thus, defendants can exert even greater pressure on plaintiffs to settle cases for a minimum recovery or to drop suits completely.

Hence, rather than lowering malpractice premiums, the increased defense costs which may result from this legislatively created legal mismatch, and which are paid directly by the insurance companies, may operate to increase malpractice premiums. What rational basis can there possibly be for attempting to lower malpractice premiums by creating an incentive to increase the cost of malpractice defense?

The attorney fee limitations imposed by section 6146 reduce plaintiffs' recoveries, exacerbate the conflict of interest between attorneys and their clients, and restrict the filing of meritorious claims. The statute does not bear a reasonable relationship to the legislative purposes of protecting plaintiffs' recoveries and lowering malpractice premiums. Thus, it violates the due process guarantees of the state and federal Constitutions.

III.

Section 6146 also violates the equal protection clause of the California Constitution. (Cal. Const., art. I, § 7.) Section 6146 creates several classifications. First, it affects only those tort victims who are injured by medical malpractice. Second, it disproportionately burdens the most seriously injured medical malpractice victims. Third, it places restrictions only on medical malpractice *plaintiffs*, not defendants.

Plaintiffs and amicae argue that this court should apply strict or intermediate judicial scrutiny to determine whether section 6146 violates equal protection. They assert that that section affects two fundamental interests — the right to petition the government (see, e.g., California Transport v. Trucking Unlimited, *supra*, 404 U.S. 508, 510-511) and the due process right to retain counsel (see, e.g., Mendoza v. Small Claims Court (1958) 49 Cal.2d 668, 673) — and classifies on a suspect basis — wealth (see Serrano v. Priest (1971) 5 Cal.3d 584, 597-598).

As discussed previously, I would hold that the fee limits not only implicate the rights of petition and due process, but also violate them independently of the equal protection guarantee. Moreover, section 6146 selectively burdens a group defined — practically, if not intentionally — on suspect grounds. Although several groups are burdened by section 6146, *only*

plaintiffs of modest means are truly unable to escape its restrictions. For these plaintiffs, the sole feasible method of financing protracted and expensive malpractice litigation is to "borrow" from the hoped-for recovery. (See *Contingent Fees, supra*, at p. 224 and discussion *ante*, pp. ___-___ [typed dis. opn. at pp. 1-2].) By contrast, affluent plaintiffs, as well as defendants, can evade the limits by contracting for legal services on an hourly basis.

Plaintiffs correctly observe that in reviewing legislation that affects fundamental rights, this court has regarded the disparate imposition of burdens according to wealth as an additional factor warranting strict scrutiny. (See, e.g., Serrano v. Priest, *supra*, 5 Cal.3d at pp. 593-598.) In my view, plaintiffs' argument for some level of heightened scrutiny has merit. However, I find it unnecessary to reach this contention since section 6146 cannot withstand any meaningful level of judicial review.

To pass the equal protection rational basis test under the California Constitution, legislative classifications must bear a "substantial and rational" relation to a legitimate state purpose. (Brown v. Merlo (1973) 8 Cal.3d 855, 872-873, 882.) In determining the purpose of the statute, the reviewing court decides whether the asserted goal is *realistically* conceivable. (Cooper v. Bray (1978) 21 Cal.3d 841, 848.) And, the court must conduct "*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals." (*Ibid.*, emphasis in original; see also Newland v. Board of Governors (1977) 19 Cal.3d 705, 711.)

In Carson v. Maurer (N.H. 1980) 424 A.2d 825 [hereafter *Carson*], the New Hampshire Supreme Court overturned a similar contingent fee scale for attorneys representing medical malpractice plaintiffs. Applying "intermediate" scrutiny, the court reasoned that "[t]he regulation of attorney's fees solely in the area of medical malpractice inevitably will make such cases less attractive to the plaintiff bar. Consequently, [the

statute] 'will at least somewhat deter the litigation of legitimate causes of actions, thus creating a potential impediment to injured individuals' access to courts and counsel.'" (*Id.*, at p. 839.)

Also, in Heller v. Frankston (Pa.Cmwlth. 1983) 464 A.2d 581, the court invalidated fee legislation similar to section 6146 on separation of powers grounds. Though the court did not reach the equal protection issue, it cited *Carson, supra,* 424 A.2d 825 in a favorable manner. (*Id.*, at p. 586, fn. 12.)[14]

Three justifications are advanced in support of section 6146. First, it is asserted that section 6146 serves the legitimate purpose of ensuring that the plaintiff receives the bulk of the recovery. (*California's Medical Malpractice Crisis, supra,* at p. 31.) However, if this is the purpose, there is no rational basis to single out medical malpractice contingent fees for special treatment. (Cf. Echlin v. Superior Court, *supra,* 13 Cal.2d 368, 374-375 [invalidating regulation of some but not all contingent fees where the evil sought to be avoided was characteristic of all attorney fees];[15] see also *Carson, supra,* 424 A.2d at p. 839.)

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[14] Two courts have upheld similar contingent fee limits. (See Johnson v. St. Vincent Hospital, Inc. (Ind. 1980) 404 N.E.2d 585, 602-603; DiFilippo v. Beck (D. Del. 1981) 520 F.Supp. 1009, 1012.) The majority suggest no reason why these decisions are more consistent with the California Constitution than *Carson*. At a minimum, the gravity of the affected interests and the relatively suspect character of the statutory classifications underscore the necessity for a meaningful level of judicial review. However, neither of these courts considered the full impact of selective fee limits on the fairness of the judicial process.

[15] In *Echlin*, this court struck down a statute which classified on the basis of the nature of the attorney fees contract. Attorneys who were to receive a contingent fee other than money were not protected by the statute. The court found "no natural, intrinsic or constitutional distinction justifying such discrimination" and held the statute void. (Echlin v. Superior Court, *supra,* 13 Cal.2d at p. 375.) The majority fail to adequately explain why section 6146, which restricts only contingent fee agreements but no other form of contract for payment of attorneys' fees, is not as arbitrary and invalid as the statute at issue in *Echlin*. (See maj. opn. at p. ___, fn. 10 [typed maj. opn. at p. 21].)

Indeed, the section's narrow reach negates any protective effect by permitting attorneys to avoid the restrictions by seeking work from the great majority of tort victims who are not covered by the fee restrictions. By contrast, statutes that have been upheld on this rationale do not leave enough unrestricted areas of private practice to permit the wholesale abandonment of covered plaintiffs. (See, e.g., American Trial Lawyers Ass'n v. New Jersey S. Ct., *supra*, 330 A.2d 350; Gair v. Peck, *supra*, 160 N.E.2d 43.) In such cases, the only person "protected" by the statute is the negligent defendant who escapes liability because the plaintiff is unable to obtain representation.

The majority assert that the special burdens imposed on medical malpractice victims are justified by the legtitimate purpose of reducing medical malpractice premiums. It is hypothesized that plaintiffs might be willing to settle for lower total recoveries if they pay a smaller percentage in attorney fees. (See maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 17].) However, this argument ignores the reality created by this statute.

Section 6146 is grossly underinclusive with regard to the objective of reducing premiums. It is not disputed that defendant and plaintiff legal fees consume about the same proportion of the premium dollar. (See *California's MICRA*, *supra*, at p. 943, fn. 687.) Furthermore, according to a systematic study of medical malpractice attorney fees, plaintiff fees are *not* significantly greater than defendant fees. (See *HEW Report*, *supra*, at p. 33.) Hence, there is no rational basis for cutting costs by restricting plaintiffs while leaving defendants free from restrictions.

Indeed, restrictions on defense fees would yield a far greater potential reduction on premiums than equivalent restrictions on plaintiff fees. Defense fees are paid directly out of insurance funds. A $1 reduction in the fee could yield a $1 reduction in premiums. By contrast, plaintiff fees are paid out of the plain-

tiff's recovery. The costs to the insurance company for any given amount of recovery are the same regardless of the size of the fee. (See generally, *California's MICRA*, *supra*, at p. 943.) Hence, the relation between plaintiff fees and premiums is — as the majority impliedly admit — speculative and indirect.

Second, the majority suggest that the Legislature may properly limit contingent fees in order to discourage frivolous suits. (Maj. opn., *ante*, at p. ___ [typed maj. opn. at pp. 17-18].) However, this purpose is not consistent with the narrow reach of the statute. The danger of frivolous suits is not confined to the medical malpractice area. Indeed, the exceptionally difficult and risky character of medical malpractice litigation provides lawyers with an extra incentive to screen out frivolous claims.[16]

Finally, the majority point out that plaintiffs in medical malpractice actions are subject to various other provisions of MICRA that limit their recoveries. Hence, "[t]he Legislature may reasonably have concludled that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of such plaintiffs from further reduction by high contingency fees." (Maj. opn., *ante*, at p. ___ [typed maj. opn. at p. 19].)

This theory exhibits a kind of cruel humor. According to the majority, the Legislature, having severely reduced malprac-

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[16] Ironically, the majority grasp at the high rate of zero recoveries to support the notion that there are special problems of unregulated fees in the medical malpractice area. It is suggested that the high incidence of failure might indicate that an unusually large proportion of frivolous claims were filed.

This creative theory ignores the fact — not seriously disputed by anyone — that once a rate of failure becomes known, lawyers take it into account in choosing whether or not to accept a case. Naturally, a high risk of failure discourages attorneys from bringing frivolous claims which yield no attorney fees, and which yield no recoupment for the high discovery and trial preparation costs which attorneys must incur in handling such cases.

tice victims' compensation, decided to "protect" plaintiffs from further reductions by prohibiting them from paying the market rate for legal representation. Unfortunately for malpractice victims — and for the majority's theory — the Legislature omitted to ensure that plaintiffs could obtain adequate legal services at the rates specified by section 6146, or that plaintiffs would actually retain a higher percentage of their recoveries.

If anything, MICRA's other provisions provide a rational basis for *higher* contingent rates in the medical malpractice area. As explained above, several of these provisions reduce the plaintiff's recovery without decreasing his or her attorney's work load. (See *ante*, at pp. ___-___ [typed dis. opn. at pp. 3-4].) Hence, to obtain the same fees that are available to them elsewhere, attorneys would have to charge higher percentage rates.

In my view, the statute cannot withstand any meaningful level of judicial scrutiny. The selective imposition of restrictions on medical malpractice victims' ability to hire competent attorneys cannot rationally be reconciled with any of the asserted purposes. Accordingly, I would hold that section 6146 violates the equal protection guarantee of the California Constitution.[17]

IV.

By inhibiting the ability of medical malpractice plaintiffs — but not defendants — to contract for legal representation, section 6146 directly implicates the fairness of the judicial

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[17] The majority have also provided no guidance to plaintiffs in this case about the rate at which they will be permitted to contract with their attorneys for representation against the remaining defendants. While the claims against the present defendants have settled, the claims against the other defendants remain to be litigated. If the plaintiffs are limited to paying their attorneys only 10

process. In a misguided effort to lower malpractice premiums, section 6146 restricts victims' access to the courts based on the content rather than the merit of their claims, reduces the recovery for medical negligence to far below a plaintiff's actual damages, and discriminates against the most severely injured victims, particularly those of limited means — all under the guise of "protecting" malpractice plaintiffs.

Section 6146 infringes on fundamental First Amendment rights and violates both the due process and the equal protection guarantees of the constitution. The relationship between its purposes and the means used to achieve those purposes is so tenuous and speculative, and the harm caused by the provision so apparent, that it cannot withstand judicial scrutiny.

By upholding section 6146, the majority do a grave injustice to victims of medical malpractice in this state and to well-established principles of constitutional law.

BIRD, C.J.

WE CONCUR:
MOSK, J.
McCLOSKEY, JPT*

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percent of any further recovery, the level of representation will undoubtedly have to be severely curtailed, assuming the attorneys can afford to continue representation. Section 6146 limits the fees an attorney may collect for representation against "*a* health care provider" (emphasis added). Since the statute refers to a single defendant, it must be presumed that the limitations imposed by section 6146 apply separately to the recoveries against each individual defendant, rather than to the aggregate recovery.

* Assigned by the Chairperson of the Judicial Council

Appendix B.

ORDER DENYING REHEARING

SF No. 24435

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ROA, JR., Et Al.

v.

LODI MEDICAL GROUP, INC., Et Al.

FILED
MAY - 8 1985

Opinions modified.

Appellant's petition

for rehearing DENIED.

Bird, C.J. and Mosk, J., are of the opinion the petition should be granted.

/s/_____
Chief Justice

MODIFICATION OF DISSENTING OPINION BY BIRD, C.J.

The above entitled opinion appearing in 37 Cal.3d beginning at page 934 is hereby modified as follows:

1. On page 944, in the first sentence of footnote 10, replace the following: "generous" in comparison to that of New Jersey *with* "not unusually low."

2. Delete the third through fifth sentences of footnote 10, beginning: "The New Jersey scheme" and ending "awarded in this case." Insert in their place: As the majority concede, the New Jersey scheme would allow a greater recovery in the case before this court than is available under MICRA. (*Id.*, fn. 6.)

MODIFICATION OF OPINION

BY THE COURT:

The above-entitled opinion, appearing at 37 Cal.3d 920, is hereby modified as follows:

1. On page 927, add the following paragraph to the end of footnote 5:

Furthermore, for the same reason there is no merit to the claim that the statute on its face unconstitutionally discriminates against poor plaintiffs. Although it may be that the continued availability of contingency fee contracts is more important to poor than to rich litigants without a factual showing that the fee limits at issue here are so low as to impinge on a plaintiff's ability to obtain a lawyer, there is no basis for finding that the statute works an invidious discrimination against the poor. It can as logically be argued that the statute — by limiting the fees an attorney can charge when he represents a client on a contingency basis — operates to the benefit of poor plaintiffs.

2. On Page 928, lines 11 and 12, delete the phrase "in fact quite generous" and substitute the phrase "not unusually low."

3. On page 928, delete the last sentence of the second paragraph of footnote 6, and substitute the following sentence: Although the New Jersey schedule, as modified in 1984 (see N.J. Rule 1:21-7 (as amended Jan. 1984)), does authorize somewhat greater fees than section 6146 in a variety of instances, the disparity does not in itself demonstrate that section 6146's fee limits deny access to an attorney.

Appendix C.

IN THE SUPERIOR COURT FOR THE
STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN JOAQUIN

FRANK ROA, JR., YVONNE JEAN ROA, and YVONNE JEAN ROA, as Guardian Ad Litem for FRANK JOSEPH ROA, Plaintiffs,	NO. 137828 ORDER APPROVING COMPROMISE OF MINOR'S CLAIM
v.	[Filed Dec. 7, 1979]
LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D. LODI COMMUNITY HOSPITAL, and DOES 1 through 50, inclusive, Defendants.	

This proceeding was heard on November 26, 1979, by the HONORABLE JAMES P. DARRAH, in Department 5 of the Superior Court, Country of San Joaquin. Present at said hearing were the Plaintiffs, FRANK ROA, JR., individually, YVONNE JEAN ROA, individually and as Guardian Ad Litem for FRANK JOSEPH ROA, and the minor Plaintiff, FRANK JOSEPH ROA, together with their counsel, ROBERT A. HARLEM, of the law firm of MILLER, KATZ, HARLEM & DIXON, INC.; and M. MAX STEINHEIMER of the law firm of DIEHL, STEINHEIMER & NORRIS, attorneys for Defendants, LODI MEDICAL GROUP, INC., and GORDON B. ROGET, M.D.; LODI COMMUNITY HOSPITAL made no appearance at said hearing, neither individually nor through counsel, although notice of said hearing was duly given. The Court having considered testimony, the Points and Authorities

filed by Plaintiffs' attorneys and after hearing argument of counsel and good cause appearing therefore, the Court does hereby make the following findings of fact and orders of Court:

FINDINGS OF FACT:

1. That the parties have negotiated a settlement as against Defendants, LODI MEDICAL GROUP, INC., and GORDON B. ROGET, M.D., in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS subject to the terms and provisions of that certain Settlement Agreement filed with the Court.

2. That the Settlement Agreement allocates the sum of FIVE THOUSAND ($5,000.00) DOLLARS, to Plaintiffs FRANK ROA, JR., and YVONNE JEAN ROA, individually, for their damages as more specifically set forth in the respective causes of action of the Complaint filed herein, and FOUR HUNDRED NINETY-FIVE THOUSAND ($495,000.00) DOLLARS to FRANK JOSEPH ROA, by and through his Guardian Ad Litem YVONNE JEAN ROA for the damages sustained by the minor child pursuant to the causes of action more specifically set forth in the Complaint filed herein.

3. That the above allocation of the settlement sum is a fair and reasonable apportionment of the settlement between the minor child and his parents.

4. That the Settlement Agreement, and all of its terms and provisions, represent a fair and just compromise of the claims of Plaintiffs, including the minor Plaintiff, and that it is in the best interests of the minor Plaintiff to settle the case in accordance with all of the terms and provisions as more particularly set forth in the Settlement Agreement.

5. That the Court expressly approves the Settlement Agreement in its entirety and it is the finding of the Court that said Settlement Agreement was entered into by and between the

parties as a result of an arms length transaction and is, in fact, a good faith settlement by and between the respective parties.

6. That the parties and their attorneys, the law firm of MILLER, KATZ, HARLEM & DIXON, INC., have heretofore entered into an understanding and agreement that attorneys' fees for the prosecution of the within action would be on the basis of 25% of the amount recovered after deduction and reimbursement of all costs of suit incurred by said attorneys; that payment of attorneys' fees pursuant to said arrangement would amount to the sum of ONE HUNDRED TWENTY-TWO THOUSAND EIGHT HUNDRED TWENTY DOLLARS AND FIFTY-SEVEN ($122,820.57) CENTS; it is the express finding of the Court that said sum is a fair and reasonable amount for attorneys' fees in this case and is in no way disproportionate to the quality or quantity of the legal services provided to the Plaintiffs in this case. It is the further finding of the Court that were it not for the existance of Business and Professions Code § 6146, the amount of attorneys' fees as requested in the Petition for Compromise would be awarded. The Court, however, feels compelled to follow the standards of Business and Profession Code § 6146 and therefore, finds that attorneys' fees must be fixed in the sum of NINETY THOUSAND SEVEN HUNDRED AND NINETY-FOUR DOLLARS AND EIGHTY-NINE ($90,794.89) CENTS.

* * * * *

Appendix D.

SUPREME COURT OF THE STATE OF CALIFORNIA

FRANK ROA, JR., *et al*,
Appellants,

vs.

LODI MEDICAL GROUP, INC., *et al*,
Respondents.

S.F. 24435
Super. Ct. 137828

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Appellants, Frank Roa, Jr., Yvonne Jean Roa, individually and as Guardian ad litem for Frank Joseph Roa, hereby appeal to the Supreme Court of the United States from the final Judgment of the Supreme Court of the State of California, entered February 7, 1985, which became final on May 8, 1985, upon the denial of a petition for rehearing and as modified by an order of the California Supreme Court on that same date, upholding Section 6146 of the California Business and Professions Code over Appellants' arguments that the statute violates the First and Fourteenth Amendments to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

July 12, 1985

Laurence H. Tribe
Counsel of Record
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

Appendix E.

California Business and Professions Code

§ 6146. Limitations; periodic payments

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) Forty percent of the first fifty thousand dollars ($50,000) recovered.

(2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered.

(3) Twenty-five percent of the next one hundred thousand dollars ($100,000) recovered.

(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars ($200,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Divison 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

(3) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No.85-216

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem for FRANK JOSEPH ROA,
Appellants,

VS.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,
Appellees.

On Appeal From
The Supreme Court of California

MOTION TO AFFIRM OR DISMISS

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No.85-216

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem for FRANK JOSEPH ROA,
Appellants,

VS.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,
Appellees.

On Appeal From
The Supreme Court of California

MOTION TO AFFIRM OR DISMISS

MAY IT PLEASE THE COURT

Appellees Lodi Medical Group, Inc., and Gordon B. Roget, M.D., move that the California Supreme Court's judgment be summarily affirmed, or in the alternative, that the appeal herein be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

This is an appeal from a decision of the California Supreme Court rejecting appellants' contentions that California Business and Professions Code Section 6146 denies them due process and equal protection and violates their rights to freedom of speech and to petition the courts for redress of grievances.

SUMMARY OF ARGUMENT

In 1975, in response to a "major health care crisis . . . attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system," the California Legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA). *American Bank and Trust Co. v. Community Hospital,* 36 Cal.3d 359, 372 n. 11, 683 P.2d 670, 678 n. 11, 204 Cal.Rptr. 671, 679 n. 11. *See generally*, Brief of Amicus Curiae, California Hospital Association. Business and Professions Code Section 6146, which limits contingency fees in medical malpractice cases according to a sliding scale, is an integral element of this act. Another important MICRA statute, Civil Code Section 3333.2, was challenged on federal constitutional grounds in an appeal which this court recently dismissed for failure to present a substantial federal question. *Fein v. Permanente Medical Group,* 38 Cal.3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal dismissed*, 474 U.S. ____ (1985).

Appellant's constitutional attack on Section 6146 is based on the premise that the statute somehow deprives malpractice plaintiffs of legal representation. Section 6146's sliding scale may make an injured patient with less than a "blockbuster" case a more attractive client. It may also operate to the benefit of both the plaintiff and the defendant by reducing the economic incentive to the plaintiff's attorney to take a case to trial which should be settled. There is no evidence, however, that Section 6146 deprives plaintiffs of representation or impinges on First Amendment rights. Appellant's jurisdictional claims, therefore, must fall.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT DICTATE AN UNRESTRAINED RIGHT TO PAY LEGAL COUNSEL.

Appellants argue that a restraint on a client's freedom to compensate counsel is of First Amendment significance whether or not that restraint will impair advocacy. Jurisdictional statement at 15, 16. This claim was ably answered by the California Supreme Court:

> Although the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing any limitation on attorneys' fees, no matter how unconscionably high such fees might be . . . *Roa v. Lodi Medical Group*, 37 Cal.3d 920, 927 n. 5, 695 P.2d 164, 167 n. 5, 211 Cal.Rptr. 77, 80 n. 5 (1985).

Additionally, the cases from which appellants attempt to fabricate this First Amendment right, *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S.Ct. 2839 (1984) and *Buckley v. Valeo,* 424 U.S. 1 (1976), are readily distinguishable. In *Munson* a state statute which prohibited a charity from paying as expenses more than twenty five percent of the funds it raised, was invalidated. There was found to be no necessary connection between fraud on the one hand and high solicitation and administrative costs on the other, and, additionally, that the state's interest in preventing fraud was only peripherally promoted by the statutory limitation and could be served by measures less intrusive. In contrast, the sliding scale established by Section 6146 is a necessary measure to alleviate and avoid a statewide crisis and to ensure equitable compensation for malpractice plaintiffs through the regulation of attorneys fees. There is no indication that the legislature's goal may be achieved by other means.

In *Buckley*, a statute which limited expenditures by political candidates from their own personal funds was found violative of the First Amendment. "It can hardly be doubted," the court noted, "that the Constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office". *Buckley, supra*, 424 U.S. at 15. Our case does not involve political expression and, unlike the direct, necessarily detrimental effect of reducing available campaign funds, there has been no demonstration that Section 6146 interferes with malpractice plaintiffs' ability to retain legal representation.

Further, this Court has upheld the validity of limitations such as that imposed by Section 6146 in the recent case of *Walters v. National Assn. of Radiation Survivors*, 105 S.Ct. 3180 (1985). *Walters* held that a veteran's First Amendment rights were not violated by 38 U.S.C. Section 3404(c), which limits attorneys who represent veterans seeking benefits for a service-connected

death or disability to a $10 fee. This Court determined that the present claims process, which allows Veterans Administration claimants to be represented by themselves or by others, provides a sufficient opportunity to make a meaningful presentation. A First Amendment right to pay a surrogate speaker, the Court proclaimed, would attach only in the absence of any meaningful alternative. *Id.*, 105 S.Ct. at 3197. In our case, appellants were permitted to pay their attorney $90,796.00, an amount demonstrably sufficient to enable them to retain counsel, abrogating any need to reach the question of a meaningful alternative. This Court also noted in *Walters* that significant government interests should be "accorded great weight" in determining the validity of a limitation on free speech. *Id.*, 105 S.Ct. at 3197. The governmental interests at stake in California—diverting more of the award to the injured plaintiff and preserving the State's health care delivery system—are of paramount significance and should be accorded such deference.

II

SECTION 6146 CONSTITUTES FAIR AND REASONABLE REGULATION OF THE FEES ATTORNEYS MAY CHARGE

In order to clothe their complaint in constitutional trappings, appellants encourage the notion that this appeal is being taken to address an injustice done to aggrieved plaintiffs. To foster this impression, Appellants characterize Section 6146 as an infringement on patient's rights, a limit on the amount "that a malpractice plaintiff may agree to pay his attorney". To the contrary, Section 6146 is a fair and reasonable effort to regulate an aspect of the practice of law and this appeal is primarily an objection by plaintiff's attorneys to the regulation of their fees.

To a significant degree, the sliding scale imposed by Section 6146 discourages attorneys from subordinating their clients' best interests to self-interest. A fully informed plaintiff would generally be interested in settling cases where liability is uncertain. An attorney, in contrast, may be particularly tempted to take a gamble on an uncertain case where the contingent fee resulting

from a potential "blockbuster" recovery promises to substantially exceed the fee recoverable from a settlement. The attorney is almost always in a better position than the injured patient to risk the possibility of receiving no compensation at all. The temptation to defer settlement is also likely to be encountered where the attorney will receive a larger fee if the case is not settled before trial.

Most importantly, Section 6146 benefits the injured patient. Prior to the enactment of MICRA, the distribution of malpractice awards was recognized as inconsistent with the public objective of fair compensation. Forty six percent of the malpractice premium dollar was associated with legal expenses, while only thirty four percent was received by the plaintiff as compensation for injuries suffered.[1] One of MICRA's purposes, and particularly the purpose of Section 6146, was to divert some of the money being spent on legal expenses to the injured patient. Appellants contend that the sliding scale of Section 6146 so diminishes the fee available to plaintiff's attorneys that personal injury lawyers will no longer accept malpractice cases, effectively denying the plaintiffs access to counsel. This contention flies in the face of a decade of experience with Section 6146 and appellants offer no evidence to support it.

In fact, Section 6146 will not mandate any reduction in the compensation received by the plaintiff's attorney who actually conducts a medical malpractice case. Rather, the oft-criticized practice of paying referral fees is likely to suffer decline. *See generally*, Brief of Amicus Curiae, California Medical Association. Despite convincing arguments that the payment of straight referral fees is detrimental to the best interests of the client,[2]

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[1] (Keene, "California's Medical Malpractice Crisis", *A Legislator's Guide to the Medical Malpractice Issue* (1976) Health Policy Center, Georgetown Univ. and the National Conference of State Legislatures)

[2] Referral fees are detrimental to the client because they drive up the cost of legal services without contributing to the quality of the service. *See*, discussion, *Moran v. Harris*, 131 Cal.App.3d 913, 182 Cal.Rptr. 519 (1982); *Referral Fees: Everybody Does It, But Is It OK?*. A.B.A. J., Feb. 1985, at 40.

California continues to permit such payment, no doubt convinced that a prohibition will be ineffective. (The only other jurisdictions which so permit are Massachusetts, Maine, and Texas). The existence of this system, where plaintiffs' attorneys share fees with others who do no actual work, stands in stark contrast to the medical profession, where referrals are made to appropriate specialists without expectation or acceptance of referral fees. A likely effect of Section 6146 is a reduction in referral fees so the plaintiffs' attorneys can maintain the same high level of compensation. Thus, the proportion of recoveries kept by clients may be significantly increased without an equivalent reduction in the income of the attorneys who actually handle their cases.

On the whole, attorneys who represent clients are likely to lose little from the effects of Section 6146 and injured plaintiffs will probably benefit. Section 6146 may well affect the way the plaintiffs' bar divides settlements and awards; the fact that some patients will keep a larger share is likely to produce a change in referral fee practices. However, fair and reasonable regulation of attorneys' fees is not a denial of the right to representation and is not vulnerable to constitutional attacks.

III

BUSINESS AND PROFESSIONS CODE SECTION 6146 DOES NOT DEPRIVE MEDICAL MALPRACTICE PLAINTIFFS OF REPRESENTATION

In the case at bar, Dr. Roget and Lodi Medical Group settled for policy limits of $500,000. This was achieved after serving a single set of interrogatories and without taking a single deposition. The attorneys fee allowed by the court, and by Section 6146, was $90,794.89.

This case does not demonstrate that Section 6146 discourages competent counsel from taking plaintiffs' medical malpractice cases. To the contrary, this case is significant evidence that Section 6146 offers rewards sufficient to encourage attorneys to accept whatever risks may be involved. This matter was clearly undertaken with full knowledge that Section 6146 was applicable. It is unconvincing for appellants to now assert that potential

rewards are insufficient to attract counsel. In the decade since MICRA's enactment, a decrease in the frequency of claims against physicians and other health care providers occurred only in the year 1976. Since then, the frequency of claims has risen, indicating that counsel have not been discouraged by the statutory limit of their fees.

The limits imposed by Section 6146 are fair and reasonable. For recoveries less than $140,000, plaintiffs' attorneys receive more than the customary one-third fee. For larger recoveries, plaintiffs' attorneys are still guaranteed a substantial fee. There is no indication that the fee limits have caused attorneys to be reluctant to accept these cases. If further experience with Section 6146 indicates a need for adjustment of the schedule, the California Legislature can make those adjustments. Appellants have not presented a constitutional issue.

CONCLUSION

Appellants' thinly veiled offensive against the regulation of their fees should be exposed for what it is. Experience has shown the limitations of Section 6146 to be both fair and reasonable, allowing sufficient attorneys' fees to attract willing counsel. Appellants' First Amendment claims cannot stand in the face of overwhelming evidence that malpractice plaintiffs in California *are* being represented.

The constitutional issues raised in Appellant's Jurisdictional Statement are baseless. The judgment should be summarily affirmed or the appeal should be dismissed.

Dated: October 24, 1985

Respectfully submitted,

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No. 85-216

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem For FRANK JOSEPH ROA,

Appellants,

vs.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF CALIFORNIA

[redacted]

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No. 85-216

IN THE
SUPREME COURT
OF THE UNITED STATES
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FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem For FRANK JOSEPH ROA,

Appellants,

vs.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,

Appellees.

MOTION TO AFFIRM OR DISMISS

Amicus curiae California Hospital Association ("CHA") moves for summary affirmance of the judgment of the California Supreme Court rejecting appellants' contention that California Business and Professions Code section 6146 violates the First Amendment. Alternatively, CHA moves that this appeal be dismissed on the ground it does not present a substantial federal question.

This motion is brought by CHA because appellees Lodi Medical Group, Inc., et al., did not appear in the California appellate courts and undoubtedly will not appear in this court. CHA carried the laboring oar in responding to appellants' constitutional attack on California Business and Professions Code section 6146 in the California courts and, so far as we know, there is no one besides CHA to move to affirm or dismiss in this Court.

In the event this Court deems it inappropriate for CHA to move to affirm or dismiss because CHA is not a party, then we respectfully request that this document be considered an amicus curiae brief in support of affirmance or dismissal on the Court's own motion.

Appellants have consented to CHA's participation as amicus curiae. The consent of appellees has not been requested since appellees have not appeared.

STATEMENT OF THE CASE

This is an appeal from a decision of the California Supreme Court rejecting appellants' contentions that California Business and Professions Code section 6146 denies them due process and equal protection and violates their rights to freedom of speech and to petition the courts for redress of grievances. Appellants do not contend the California Supreme Court erroneously rejected their due process and equal protection claims; their appeal is limited to the questions of free speech and the right to petition.

Appellants' statement of the case adequately sets forth the relevant facts from the record. We take issue only with those portions of appellants' statement which, instead of stating facts, characterize section 6146 and the opinion of the California Supreme Court in argumentative terms. Our position on the statute and the California court's opinion is explained below.

SUMMARY OF ARGUMENT

During the mid-1970s California was in the throes of a health care crisis caused by skyrocketing medical malpractice insurance premiums. The State Legislature responded to the crisis by enacting a comprehensive package of statutes, including Business and Professions Code section 6146, designed to restrain the increase in premiums and keep California's health care system functioning.

Appellants' constitutional attack on section 6146 is premised on the notion that the statute, which limits attorneys' contingent fees in medical malpractice cases, somehow "deprives" malpractice plaintiffs of legal representation. We will show the total absence of factual basis for this assertion. Without this essential factual underpinning, appellants' entire Jurisdictional Statement falls.

For good measure we will distinguish the cases appellants rely on and explain that this Court's recent decision in *Walters v. National Association of Radiation Survivors*, 53 L.W. 4947 (U.S., June 28, 1985), pulls the rug from under appellants' constitutional claims.

ARGUMENT

I.

CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 6146 IS PART OF A COMPREHENSIVE PACKAGE OF STATUTES DESIGNED TO ALLEVIATE A CRISIS IN CALIFORNIA'S HEALTH CARE SYSTEM CAUSED BY SKYROCKETING MEDICAL MALPRACTICE INSURANCE PREMIUMS.

In May 1975 the Governor of California convened the Legislature in extraordinary session to consider measures aimed at remedying a crisis in health care. The nature of the crisis was described recently by the California Supreme Court in *American Bank & Trust Co. v. Community Hospital*, 36 Cal.3d 359, 371, 683 P.2d 670, 677-78, 204 Cal.Rptr. 671, 678-79 (1984):

> "The problem . . . arose when the insurance companies which issued virtually all of the medical malpractice insurance policies in California determined that the costs of affording such coverage were so high that they would no longer continue to provide such coverage as they had in the past. Some of the insurers withdrew from the medical malpractice field entirely, while others raised the premiums which they charged to doctors and hospitals to what were frequently referred to as 'skyrocketing' rates. As a consequence, many doctors decided either to stop providing medical care with respect to certain high risk procedures or treatment, to terminate their practice in this state altogether, or to 'go

> bare,' i.e., to practice without malpractice insurance. The result was that in parts of the state medical care was not fully available, and patients who were treated by uninsured doctors faced the prospect of obtaining only unenforceable judgments if they should suffer serious injury as a result of malpractice."

See *id.*, at 363 n.1, 683 P.2d, at 672 n.1, 204 Cal.Rptr., at 673 n.1 (quoting the Governor's executive proclamation calling the Legislature into extraordinary session).

The Legislature, "which thoroughly investigated this matter through numerous hearings, audits and the like," *id.*, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679, expressly found and declared

> " 'that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.' " *Id.*, at 372 n.11, 683 P.2d, at 678 n.11, 204 Cal.Rptr., at 679 n.11.

The Legislature responded to the crisis by enacting the Medical Injury Compensation Reform Act of 1975 (MICRA),

> "a lengthy statute which attacked the problem on several fronts. In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing

> alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation." *American Bank & Trust*, 36 Cal.3d, at 363-64, 683 P.2d, at 672, 204 Cal.Rptr., at 673.

MICRA provisions "made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums." *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 159, 695 P.2d 665, 680, 211 Cal.Rptr. 368, 383 (1985). Specifically, these changes are designed to:

1. Permit the defendant to introduce evidence of collateral source recovery by the plaintiff and the plaintiff to introduce evidence of the amount paid or contributed to secure the right to such benefits. Cal. Civ. Code § 3333.1, subd. (a), upheld in *Fein*, 38 Cal.3d, at 164-67, 695 P.2d, at 784-86, 211 Cal.Rptr., at 387-90.

2. Eliminate the subrogation rights of a collateral source. Cal. Civ. Code § 3333.1, subd. (b), upheld in *Barme v. Wood*, 37 Cal.3d 174, 689 P.2d 446, 207 Cal.Rptr. 816 (1984).

3. Limit recovery of nonpecuniary loss to $250,000. Cal. Civ. Code § 3333.2, upheld in *Fein*, 38 Cal.3d, at 157-64, 695 P.2d, at 679-84, 211 Cal.Rptr., at 382-87.[1]

4. Require periodic payment of any award for future damages which equals or exceeds $50,000. Cal. Code Civ. Proc. § 667.7, upheld in *American Bank & Trust*.

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[1] A Jurisdictional Statement and Motion to Dismiss are currently pending consideration by this Court in *Fein*, No. 85-19.

5. Limit contingent fee payments to attorneys. Cal. Bus. & Prof. Code § 6146, upheld in *Roa v. Lodi Medical Group, Inc.*, 37 Cal.3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

6. Shorten the statute of limitations. Cal. Code Civ. Proc. § 340.5, upheld in *Kite v. Campbell*, 142 Cal.App.3d 793, 191 Cal.Rptr. 363 (1983).

7. Require 90 days' notice to the defendant before filing suit. Cal. Code Civ. Proc. §§ 364-65.

8. Permit arbitration agreements between doctors and patients. Cal. Code Civ. Proc. § 1295.

By these tort reforms and the other MICRA reforms in the areas of health care quality control and review of insurance premium increases[2]

> "the Legislature hoped (1) to restore insurance premiums to a level doctors and hospitals could afford, thereby inducing them to resume providing medical care to all segments of the community, and (2) to insure that insurance

---

[2] Assemblyman Barry Keene, author of MICRA, explained:

> "A general policy (and . . . *political*) decision was made that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. These included physicians, lawyers, insurance companies, and patients alike. [MICRA] was drafted to include all reforms in order to prevent any one interest group from sabotaging any single-objective bill."

Keene, "California's Medical Malpractice Crisis" in *A Legislator's Guide to the Medical Malpractice Issue* 27, 30 (1976, Health Policy Center, Georgetown University and The National Conference of State Legislatures), emphasis in original.

> "[B]y pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the 'equal bite' theory behind [MICRA]."

Id., at 33.

> would in fact be available as a protection for patients injured through medical malpractice." *American Bank & Trust*, 36 Cal.3d, at 372, 683 P.2d, at 678, 204 Cal.Rptr., at 679.

MICRA has had the desired impact. It created enough promise of stability to encourage doctors to form their own insurance carriers. By January 1982, 80 percent of the members of the California Medical Association were insured by physician-owned carriers or a cooperative trust, according to a CMA survey. California Medical Association, *Socioeconomic Report*, Vol. XXII, No. 5 (July/Aug. 1982), at 30. Only 6.1 percent of the CMA members surveyed were uninsured in 1982. *Ibid.*

The medical malpractice insurance problem, however, is not yet over; MICRA is as vital today as it was in 1975. In an analysis of California medical malpractice cases over $50,000 reported in the *Professional Liability Newsletter*, *Jury Verdicts Weekly*, and *Verdict Reports* during 1983, comparing previous reports of large losses from 1972 through 1983, Medical Underwriters of California, the corporate attorney-in-fact for the oldest physician-owned carrier in California, concluded:

> "More cases costing more money than ever before were reported in these publications during 1983. The medical, legal and insurance press have referred repeatedly to a renewed 'malpractice crisis' during the year. The impact of this new 'crisis' has not been felt as acutely in California as in Florida or New York, but the rapid rise in the number and average costs of large cases as shown in this report almost ensures that malpractice premium rate increases and restrictions in choices of coverage will occur." Medical Underwriters of California, *California Large Loss Trend Study — Malpractice 1983 Update*, at 1.

An American Medical Association task force recently reported:

> "A look at what has been happening with regard to numbers and costs of claims reveals that the professional liability problem is again extremely serious — and that actually, in some areas of the nation, from a financial impact standpoint, it is more serious than it was in the mid-'70s. [¶] The temporary respite that followed the mid-'70s upheaval is over." American Medical Association Special Task Force on Professional Liability and Insurance, *Professional Liability in the '80s*, Report 1 (Oct. 1984), at 10.

II.

BUSINESS AND PROFESSIONS CODE SECTION 6146 WORKS HAND-IN-HAND WITH THE OTHER TORT REFORMS TO ACHIEVE THE LEGISLATURE'S PURPOSE TO RESTRAIN THE INCREASE IN MEDICAL MALPRACTICE INSURANCE PREMIUMS.

Section 6146 prescribes the following sliding scale for attorneys' contingent fees in medical malpractice cases: (1) 40 percent of the first $50,000 recovered; (2) 33 and 1/3 percent of the next $50,000 recovered; (3) 25 percent of the next $100,000 recovered; and (4) 10 percent of any amount recovered in excess of $200,000. (The fee permitted by section 6146 for appellants' attorney in this case is $90,800, compared to $122,800 if section 6146 had not been enacted. *Roa*, 37 Cal.3d, at 924-25, 695 P.2d, at 165-66, 211 Cal.Rptr., at 79.)

The California Supreme Court explained in this case how section 6146 interacts with the other MICRA tort reforms

to ensure that the full burden of insurer savings does not fall on plaintiffs alone:

> "In order to reduce malpractice insurance costs, MICRA incorporated a number of provisions that place special limits on, or that at least may tend to reduce, a malpractice plaintiff's recovery, provisions that are not applicable to other personal injury plaintiffs. (See, e.g., Civ. Code, § 3333.2, subd. (b) [limiting recovery for noneconomic losses to $250,000]; 3333.1, subd. (a) [authorizing admission of evidence of 'collateral source benefits'].) The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of such plaintiffs from further reduction by high contingency fees." *Roa*, 37 Cal.3d, at 932, 695 P.2d, at 171, 211 Cal.Rptr., at 84.

The court also explained how section 6146 itself could contribute to reduced malpractice insurance costs:

> "A plaintiff is quite naturally concerned with what a proposed settlement will yield to him personally, and because section 6146 permits an attorney to take only a smaller bite of a settlement, a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery from the lower settlement." *Id.*, at 931, 695 P.2d, at 170, 211 Cal.Rptr., at 83.

For example, a plaintiff who needs $1 million cannot settle for less than $1,666,667 if the contingent fee is 40 percent, or $1,500,000 if the fee is 33-1/3 percent. Under section 6146 the case could be settled for a little less than $1,200,000. And to the extent more cases settle the amount insurers pay in legal fees to defense lawyers will go down, further favorably impacting insurance premiums.

The California Supreme Court also observed that

> "an unusually high percentage of medical malpractice cases that go to trial result in defense verdicts. While there may be many explanations for this phenomenon, the Legislature could rationally have believed that unregulated contingency fee contracts — calling for potentially huge attorney fee awards if cases are won — play at least some part in leading so may plaintiffs to pursue malpractice claims that ultimately prove unsuccessful." *Ibid.*

The court pointed out that section 6146 'reduc[es] plaintiffs' attorneys' incentive to encourage their clients to pursue marginal claims." *Ibid.*[3]

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[3] In their Jurisdictional Statement appellants attack the California Supreme Court's assessment of the role of section 6146 in achieving the legislative purpose to restrain the increase in insurance premiums. They claim "the legislative history of Section 6146 indicates that the California Assembly . . . did not seriously contend that limiting plaintiffs' attorneys' fees would do anything to alleviate the 'crisis' in malpractice insurance." Jurisdictional Statement, at 23. Appellants' citations to the legislative record, *id.*, at 23 n.27, ostensibly in support of their assertion, in fact lend no support whatsoever. At the pages cited in the transcript of the February 18, 1975 hearing of the Assembly Select Committee on Medical Malpractice (87-89, 104-05), witness Arne Werchik, *an attorney specializing in medical malpractice litigation on behalf of plaintiffs*, Hearing Transcript, at 76, not a legislator, testified that contingent fees do not affect the size of jury verdicts or settlements and reducing such fees would have no effect on doctors' insurance costs. Assemblyman Brman replied, "Possibly that's so." *Id.*, at 105. As for the February 21, 1975 hearing, at the pages cited (80-87), Assemblyman Berman asked witness Kay Eberhard, vice-president of an insurance company, Hearing Transcript, at 67, how limiting contingent fees would address the problem of insurance availability. Mr. Eberhard explained that his proposal included disclosure of the reduced fee to the jury. He believed juries do take the fee into consideration in arriving at their verdict, so disclosure of reduced fees would result in lower verdicts. Finally, at the page cited in the Report of the Auditor General (30), the statement is: "*Unless the amount of medical malpractice settlements continue to rise in the future* there will be little if any effect on medical

malpractice insurance rates as a result of limitations imposed on attorney contingency fees." Emphasis added. It is undeniable that settlement amounts *did* continue to rise. The average amount of indemnity per claim over $50,000 in California rose from $403,279 in 1975 to $790,028 in 1983. The number of awards and settlements exceeding $1 million increased from 4 in 1975 to 19 in 1983. Medical Underwriters of California, *supra*, at 6. In sum, there is nothing in these citations to the legislative record to support appellants' claim that the Assembly "did not seriously contend that limiting plaintiffs' attorneys fees would do anything to alleviate the 'crisis' in malpractice insurance."

Appellants also err in referring to what they claim is "the legislature's own conclusion that there was no significant evidence of . . . meritless litigation" which could be screened out by lower contingent fees. Jurisdictional Statement, at 24. They cite page 5 of the Preliminary Report of the Assembly Select Committee on Medical Malpractice, which was issued about one year before the Governor called the Legislature into extraordinary session to address the malpractice insurance crisis. The report only says: "[T]here is little evidence that a *large number* of non-meritorious medical malpractice nuisance suits have been filed. . . ." Emphasis added. Moreover, appellants inaccurately represent that "the legislature itself found a 95% rejection rate of claims prospective plaintiffs brought to a lawyer's attention." Jurisdictional Statement, at 24. Instead, the Preliminary Report stated *experienced* medical malpractice lawyers report they reject 95 percent of cases. It went on to say:

> "Thus is appears that if there is a nuisance suit problem, it is the result of cases brought by attorneys who have limited experience in handling malpractice cases. As an increasing number of trial lawyers are entering the malpractice field due to its lucrative potential and the threat of no-fault auto insurance, there may, indeed, be an increase in less meritorious cases." P.43.

Most significantly, appellants ignore the fact that the Preliminary Report recommended "that the contingency fee should be studied with a view, particularly in cases involving substantial verdicts or settlements, to adopting a sliding scale . . . ." P.12.

Finally, appellants brand as "a creation of the California Supreme Court's imagination," Jurisdictional Statement, at 25-26 n.32, the idea that the Legislature intended to protect the already diminished compensation of medical malpractice plaintiffs from further reduction by high contingency fees. They base this assessment on the Legislature's

In short, by enacting section 6146 and the other MICRA tort reforms,[4] the Legislature intended to achieve a significant favorable effect on insurance premium rates without seriously harming injured plaintiffs while still adequately compensating their attorneys. Toward these ends, the section 6146 fee scale encourages attorneys to take smaller cases and provides a fair return to the attorney instead of a windfall in large-recovery cases. In this case, it allowed appellants' attorney a substantial $90,800 fee based on a $500,000 recovery achieved by settlement without trial.

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supposed acceptance of the proposition that malpractice plaintiffs' attorneys must recoup relatively large fees in the one out of three trials they win in order to make up for the two-thirds they lose. *Id.*, at 25 and 25-26 n.32. The only thing appellants cite to support this claim of legislative acceptance is the Preliminary Report of the Select Committee, at 48, where it says:

> "Plaintiffs' lawyers claim, with some justification, that the high percentages are necessary to compensate them for cases which have been unsuccessful. [Footnote:] A survey conducted by the HEW Commission showed that when acounting for cases both won and lost, the compensation of the attorneys under the contingent fee arrangement did not markedly differ from the compensation of defense attorneys who operate under an hourly rate. *The committee has been told, however, that malpractice specialists in California are earning far more than the $63.00 an hour figure cited by the Commission.*" Emphasis added.

On the very next page of the report the Committee makes its recommendation that the contingent fee be studied with a view to adopting a sliding scale. P. 49.

[4] "Although we do not suggest that the Legislature felt that . . . any . . . single provision of MICRA . . . was essential to the survival of the medical malpractice insurance system, there is surely nothing in the due process clause which prevents a legislature from making a number of statutory changes which, in combination, provide the requisite benefit to justify the enactment." *Fein*, 38 Cal.3d, at 160-61 n.18, 695 P.2d, at 682 n.18, 211 Cal.Rptr., at 385 n.18.

III.

THE ESSENTIAL PREMISE UNDERLYING APPELLANTS' FIRST AMENDMENT CLAIMS — THAT SECTION 6146 'DEPRIVES' MEDICAL MALPRACTICE PLAINTIFFS OF LEGAL REPRESENTATION — IS WHOLLY WITHOUT FACTUAL BASIS.

Section 6146 limits contingent fees in medical malpractice cases according to a sliding scale. In this case, the allowable fee based on appellants' $500,000 recovery by settlement is $90,800. This is not the $122,800 that appellants' attorney would have received otherwise, but there is no denying that it is still a substantial fee.

Despite this reality, the Jurisdictional Statement reads as though section 6146 flatly prohibits rather than reasonably limits contingent fees in medical malpractice cases. As though mere repetition could make it true, appellants state numerous times in various ways that section 6146 *deprives* malpractice plaintiffs of legal representation: e.g., it "effectively denies injured plaintiffs access to counsel and a day in court," Jurisdictional Statement, at 3; "impairs the court access of non-affluent injured individuals by drastically restricting the contingency fees," *ibid.*; "directly forbids *clients* — prospective plaintiffs — from engaging and compensating counsel on mutually acceptable terms," *id.*, at 12, emphasis in original; "[b]y drastically restricting the percentage levels of contingency fees . . . effectively denies a large category of plaintiffs access to both legal counsel and the courts of law," *id.*, at 16; "directly and drastically impairs" the right to petition the courts, *ibid.*; "singles out plaintiffs of modest or meager means for the *de facto* denial of legal representation and legal redress," *id.*, at 18; "radically alters the prospects for obtaining legal representation," *ibid.*; "deters plaintiffs' lawyers from

taking or vigorously prosecuting complex malpractice claims," *id.*, at 20; has "preclusive effects," *id.*, at 21; results in plaintiffs "find[ing] themselves denied adequate representation and effectively precluded from winning the malpractice recovery they merit," *ibid.*; results in "denials of access and destructions of claims," *ibid.*; "chok[es] off access to legal representation," *id.*, at 24; "frustrates a claimant's access to court," *id.*, at 25; constitutes a "debilitating wholesale restriction[ ] on the only means of retaining counsel," *id.*, at 27.

No matter how often appellants repeat it, their claim that section 6146 deprives malpractice victims of legal counsel is *ipse dixit*, founded on nothing more than appellants' own opinion of the "inevitable impact of Section 6146," *id.*, at 19, see 21. Appellants offer no factual support whatsoever from the record (or even from outside the record) based on experience with the statute. The California Supreme Court pointed out this flaw in appellants' arguments:

> "To the extent that . . . [the] First Amendment contention rests on the proposition that the particular fees allowed by section 6146 are too low to permit the effective exercise of the right to bring a lawsuit, the argument parallels plaintiff's claim . . . that the statute denies his due process right to counsel by making it difficult or impossible to secure an attorney. As we explain, the record provides no factual basis to support such a claim." *Roa*, 37 Cal.3d, at 927 n.5, 695 P.2d, at 168 n.5, 211 Cal.Rptr., at 81 n.5.
>
> "Plaintiffs contend . . . the authorized fees are so low that in practice the statute will make it impossible for injured persons to retain an attorney to represent them. The adequacy of the fees permitted by the statute is in large measure an empirical matter, and plaintiffs have made no showing to support their factual claim. . . . Under

> the circumstances, we certainly cannot hold that the amount of the fees permitted renders the statute unconstitutional on its face." *Id.*, at 927-28, 695 P.2d, at 168, 211 Cal.Rptr., at 81.

Appellants' attempt to convince this Court that section 6146 marks the end of legal representation for victims of medical malpractice in California rings hollow. The limits imposed by section 6146 are fair and reasonable. For recoveries less that $140,000, plaintiffs' attorneys used to receiving a one-third fee are better off than before.[5] For larger recoveries, plaintiffs' attorneys receive a substantial fee. If, after experience with the fee limitation, it turns out that adjustments need to be made to ensure that attorneys are not deterred from bringing meritorious cases, the Legislature can make those adjustments. There is no constitutional impediment here.

IV.

APPELLANTS' ARGUMENT THAT MEDICAL MALPRACTICE PLAINTIFFS HAVE A FIRST AMENDMENT RIGHT TO DECIDE FOR THEMSELVES HOW MUCH TO COMPENSATE COUNSEL "WITHOUT MEDDLING BY EVEN A WELL-MEANING GOVERNMENT" IS UNSUPPORTABLE.

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[5] Less-seriously injured claimants have always had trouble finding counsel. See *Report of the Secretary's Commission on Medical Malpractice*, DHEW Pub. No. (OS) 73-88, at 33. The Legislature took this fact into consideration when it provided for the highest percentage fee (40 percent) for recoveries below $50,000 and exempted such recoveries from the limitation on noneconomic loss, Cal. Civ. Code § 3333.2, and the periodic payment of future damages, Cal.Code Civ. Proc. § 667.7.

No doubt aware of the serious obstacle posed by their lack of a factual showing of denial of legal representation, appellants also argue: "The determination of how much of one's resources to devote to protected advocacy is *itself* of First Amendment significance, regardless of whether one can prove by some extrinsic measure that a restraint on a client's freedom to compensate counsel will objectively 'impair' that advocacy." Jurisdictional Statement, at 15, 16, emphasis in original.

As the California Supreme Court pointed out, however, "Although the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing *any* limitation on attorney fees, no matter how unconscionably high such fees might be . . . ." *Roa*, 37 Cal.3d, at 927 n.5, 695 P.2d, at 167 n.5, 211 Cal.Rptr., at 80 n.5, emphasis in original.

In *Calhoun v. Massie*, 253 U.S. 170 (1920), this Court rejected a constitutional challenge to a provision of federal law which limited contingent fees to 20 percent of the recovery. Appellants contend *Calhoun* is "dubious authority . . . because it did not address a First Amendment claim. . . ." Jurisdictional Statement, at 13. But *Calhoun* did address a due process claim. In *Walters v. National Association of Radiation Survivors*, 53 L.W. 4947, discussed *infra*, this Court concluded in the context of a statutory limit on attorneys' fees that "appellees' First Amendment arguments, at base, are really inseparable from their due process claims." *Id.*, at 4956. The thrust of both claims is denial of " 'meaningful access to the courts.' " *Ibid.*

Secretary of State of Maryland v. Joseph H. Munson Co., —U.S—, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), and *Buckley v. Valeo*, 424 U.S. 1 (1976), which appellants rely on for the proposition that they have a First Amendment right to spend as much as they like on legal advocacy in a medical malpractice case, are readily distinguishable.

Munson involved a state statute prohibiting a charitable organization, in connection with any fundraising activity, from paying as expenses more than 25 percent of the amount raised. This Court held the statute violated the First Amendment even though it permitted an administrative waiver of the limitation where it would effectively prevent the charity from raising contributions because "[t]he statute does not help the charity whose solicitation costs are high because it chooses . . . to disseminate information as a part of its fundraising." __U.S., at __, 104 S.Ct., at 2850, 81 L.Ed.2d, at 800. There being no necessary connection between fraud and high solicitation and administrative costs, *id.*, at __, 104 S.Ct., at 2850, 81 L.Ed.2d, at 798-99, the state's interest in preventing fraud was "only peripherally promoted by the limitation and could be served by measures less intrusive than a direct prohibition on solicitation." *Id.*, at __, 104 S.Ct., at 2849, 81 L.Ed.2d, at 798. In short, the limitation was "insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech." *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980).

In our case, there is no evidence section 6146 interferes with the exercise of First Amendment rights. Also, the Legislature's goal of alleviating a crisis in health care by restraining the increase in medical malpractice insurance premiums is of far greater significance than the state interest in *Munson*. See *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power"). The connection between the MICRA tort reforms, including section 6146, and the legislative goal is far closer than in *Munson*. Finally, nothing suggests the important state interest in this case can readily be achieved by other means.

In *Buckley*, this Court held the governmental interest served by limiting expenditures by political candidates from their own personal funds, i.e., equalizing the relative financial resources of candidates competing for elective office, "is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights." 424 U.S., at 54. The ceiling on personal expenditures in *Buckley* clearly and directly limited political expression " 'at the core of our electoral process and of the First Amendment freedoms.' " *Id.*, at 39. " '[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for public office.' " *Id.* at 15. Moreover, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.*, at 19, footnote omitted. *Buckley* is a far cry from our case, which does not involve political expression and where there is no reason to believe section 6146 interferes with malpractice plaintiffs' ability to pursue their rights in the courts through retained counsel.

V.

THIS COURT'S RECENT DECISION IN *WALTERS V. NATIONAL ASSOCIATION OF RADIATION SURVIVORS* REFUTES APPELLANTS' CONSTITUTIONAL ATTACK ON SECTION 6146.

In *Walters*, 53 L.W. 4947, this Court held 38 U.S.C. § 3404(c), which limits attorneys who represent veterans seeking benefits for service-connected death or disability to a $10 fee, does not violate the veterans' First Amendment rights. First, this Court noted the cases

> "establish[ing] for individuals and organizations a right to ensure 'meaningful access to courts' for themselves or their members . . . involved the rights of unions and union members to retain or recommend counsel for proceedings where counsel were allowed to appear, and the First Amendment interest at stake was primarily the right to associate collectively for the common good. In contrast, here the asserted First Amendment interest is primarily the individual interest in best prosecuting a claim, and the limitation challenged applies across the board to individuals and organizations alike." 53 L.W., at 4955.

The same distinctions exist with regard to California Business and Professions Code section 6146.

Next, this Court labeled as "questionable" the proposition that Veterans Administration claimants, who are allowed to speak for themselves or have someone speak for them, "also have a First Amendment right to pay their surrogate speaker." 53 L.W., at 4956. "[S]uch a First Amendment interest would attach only in the absence of a 'meaningful' alternative," and under the VA claims process a claimant does have an opportunity to make a meaningful presentation. *Ibid.* In contrast to the statute at issue in *Walters*, section 6146 permits a fee sufficiently large to enable medical malpractice plaintiffs to retain competent counsel. (In this case, appellants were permitted to pay their attorney $90,800.) Thus, it is not even necessary to reach the question of a "meaningful alternative" to representation by counsel in order to sustain the statute.

Finally, in *Walters* this Court noted that significant government interests favor the limitation on "speech." Those interests were "Congress' principal goal of wanting the veteran to get the entirety of the award" and not "complicat[ing] a proceeding which Congress wished to

keep as simple as possible." 53 L.W., at 4953. We submit the government interest at stake in California — preservation of the State's health care delivery system — is of paramount significance.

In short, if the $10 attorney's fee permitted in *Walters* does not violate the First Amendment, then the substantial attorney's fee permissible under section 6146 — $90,800 in this case — certainly does not, either.

CONCLUSION

For the reasons stated, the judgment of the California Supreme Court should be summarily affirmed or, in the alternative, this appeal should be dismissed.

Dated: September 4, 1985.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 4, 1985, I served the within MOTION TO AFFIRM OR DISMISS in re: "Frank Roa, Jr., Yvonne Jean Roa vs. Lodi Medical Group, Inc., Gordon B. Roget, M.D., Lodi Community Hospital" in the Supreme Court of the United States, October Term, 1985, No. 85-216;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

LAURENCE H. TRIBE, Griswold Hall 307, 1525 Massachusetts Ave., Cambridge, MA 02138;
ROBERT A. HARLEM, INC. & ASSOC., Suite 2410, 120 Montgomery St., San Francisco, CA 94104;
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and 1 copy on each of the following:

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SAN JOAQUIN COUNTY CLERK, Superior Court of San Joaquin County, For: Hon. JAMES P. Darrah, Judge, Room 370, 222 East Weber Ave. Stockton, CA 95205;
CLERK, COURT OF APPEAL, Third Appellate District, Room 119, Library and Courts Bldg. Sacramento, CA 95814;
JAMES E. DONOHUE, ESQ., Suite 201, 716 Tenth St., Sacramento, CA 95814;

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on September 4, 1985

at Los Angeles, California.

Verdie Kettland

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, September 4, 1985, I served the within MOTION TO AFFIRM OR DISMISS in re: "Frank Roa, Jr., Yvonne Jean Roa vs. Lodi Medical Group, Inc., Gordon B. Roget, M.D., Lodi Community Hospital" in the Supreme Court of the United States, October Term, 1985, No. 85-216;

on the persons interested in said action by placing 1 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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CLERK, CALIFORNIA SUPREME COURT, Room 213, 3580 Wilshire Blvd., Los Angeles, CA 90010;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on September 4, 1985
at Los Angeles, California.

Kathleen Kattenhorn

Supreme Court, U.S.
FILED
SEP 11 1985
JOSEPH F. SPANIOL, JR
CLERK

(3)

No. 85-216

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

FRANK ROA, JR., YVONNE JEAN ROA, Individually And As Guardian Ad Litem for FRANK JOSEPH ROA,
Appellants,

v.

LODI MEDICAL GROUP, INC., GORDON B. ROGET, M.D., LODI COMMUNITY HOSPITAL,
Appellees.

On Appeal From
The Supreme Court of California

BRIEF OF AMICUS CURIAE [redacted]

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BRIEF OF AMICUS CURIAE INCLUDING MOTION TO AFFIRM OR DISMISS

MOTION TO AFFIRM OR DISMISS
INTEREST OF AMICUS CURIAE

There is a unique reason for this appearance by Amicus. Without the participation of Amicus, there would be only one side to the case. This is an appeal by the plaintiffs' attorneys from the trial court's refusal to award them fees which exceed statutory limits. These fees would have been paid from a settlement obtained for a two year old child injured at birth, paid by the defendant physician's insurer. There was no separate representation for the nominal appellants, the child's guardians ad litem. The nominal respondents, defendant physician and his medical group, have no standing to contest this appeal under California law: *Niles v. City of San Rafael* 42 Cal.App.3d 230, 116 Cal.Rptr. 733 (1974). Opposition was confined to amicus presentations, the

first such presentation being contained in the brief filed by this amicus before the California Court of Appeal. Indeed, the California Supreme Court took note of the fact that numerous amicus briefs had been filed, representing competing viewpoints, in discussing standing and the potential conflict of interest between plaintiffs and their attorneys on the issue of fees. Appellants' written consent to the filing of this brief has been secured.

The California Medical Association represents the great majority of physicians in private practice in California, one of the groups particularly affected by the 1975 professional liability insurance crisis which was resolved by the adoption of the Medical Injury Compensation Reform Act ("MICRA"). The various amici who appeared below in this and other "MICRA" cases divided their responsibilities, to avoid duplicative presentations. This amicus has addressed MICRA's practical aspects and consequences. The Jurisdictional Statement is particularly vulnerable to assessment on the basis of reality.

REQUEST FOR SUMMARY AFFIRMANCE OR DISMISSAL

Because of the unique circumstances attending this appeal, amicus curiae California Medical Association moves for summary affirmance of the California Supreme Court's judgment, or in the alternative, the dismissal of this appeal for failure to present a substantial federal question. Should the court not recognize amici for the purpose of such a motion, then we respectfully request that this brief be accepted by the Court as an argument supporting dismissal of the appeal upon the Court's own motion.

STATEMENT OF FACTS

An obvious anomaly which this court might take into account in determining whether this appeal warrants more than summary consideration is the fact that the record below was entirely under the control of Mr. Harlem, the attorney who concluded the settlement, sought the additional fees, and brought this appeal.

Since the record was entirely under the control of appellants' attorneys, this court might be wary of accepting significant con-

clusions founded on scanty foundations. The fact that the record is devoid of any evidence supporting appellants' claim of unconstitutional impediment to the retention of counsel or other alleged abuse also must fall hard on appellants.

We call attention to counsel's personal interest in the outcome of this matter because the jurisdictional statement is crafted to develop the notion that this appeal is being pursued by plaintiffs whose attorneys have only an incidental interest in the outcome. To foster this impression, and to bolster an argument which does not survive scrutiny, Business & Professions Code § 6146 is characterized as a statute which limits the amount "that a malpractice plaintiff may agree to pay to his attorney" or the amount "that malpractice plaintiffs may offer attorneys". While § 6146 undeniably has impact upon the plaintiff, appellants seem reluctant to acknowledge that § 6146 imposes direct limitations upon *attorneys*. If violations occur, it is the attorney who violates the statute. Appellants prefer to stand § 6146 on its head. Appellants' real claim is that the legislature should not be permitted to limit attorneys' fees.

ARGUMENT

THE REAL CONSEQUENCES OF SECTION 6146

Section 6146 establishes a sliding scale which, as the California Supreme Court noted, has frequently been recommended as the preferable form of regulation. One of the consequences of this sliding scale approach is that the injured patient with less than a "blockbuster" case becomes a more attractive client.

However, these are not the only cases affected by § 6146. In other cases, Section 6146 operates to the benefit of both the plaintiff and the defendant by reducing the economic incentive to the plaintiff's attorney to take a case to trial which should be settled. This incentive may exist either because the attorney will receive a larger fee if the case is not settled before trial, or because an appealing plaintiff or catastrophic injury will bring in a blockbuster award, including a seven figure fee, *if* doubtful liability can be surmounted. Defense costs are a significant

professional liability expense. This expense can be reduced if cases which should be settled are settled promptly.

It is extremely significant that the legislature was concerned because so much of the money spent for professional liability insurance is never paid to injured patients. Section 6146 gives the injured patient a greater share of the settlement or award. Despite enactment of § 6146, it is by no means a foregone conclusion that the attorney who actually does the work in securing the settlement or award will receive less money. This is because California is one of the few jurisdictions which allows the payment of "straight" referral fees to attorneys who provide little or no service. This practice has been widely criticized and is likely to be affected by § 6146's provisions.

On its face, one cannot conclude that § 6146 provides inadequate reward for the attorney prosecuting a contingent fee case, with its inherent risk. For example, § 6146 allows fees as follows:

Amount of Settlement Or Judgement	Amount of Attorneys' Fees
$ 100,000	$ 36,667
$ 250,000	$ 66,667
$ 500,000	$ 91,667
$1,000,000	$141,667

It is difficult to conclude that counsel was inadequately compensated in this case. Plaintiff Joseph Roa was born on May 7, 1977. In 1979, approximately one year after the complaint was filed, the insurer for Dr. Roget and Lodi Medical Group agreed to pay policy limits, $500,000, $495,000 being allocated to the minor's claim. The attorneys who are the real parties in interest herein assert that they engaged in substantial preparation and settlement negotiations, but it does appear they they achieved settlement, for policy limits, without taking a single deposition, after serving a single set of interrogatories. The fee allowed by the court, and by § 6146, is $90,794.89.

Appellants' Arguments Are Contradicted By Experience

Certainly this case does not demonstrate that § 6146 discourages competent counsel from taking these cases. The matter was

undertaken with full knowledge that § 6146 was applicable, and that court approval of counsel's fee would be required, as in all minor's claims. In the nearly ten years since § 6146 was enacted, a decrease in the frequency of claims against physicians and other health care providers was observed in the year 1976, contemporaneous with the crisis and legislative action. Thereafter, the frequency of claims rose at a rate which indicates that counsel have not been discouraged by the statutory limit on their fees. This case itself suggests that § 6146 offers rewards adequate to accept the risk.

Section 6146 may require that lawyers modify their behavior, but not to their clients' disadvantage. Indeed, the cases which injured plaintiffs would most want to settle are cases where injuries are particularly severe, but where liability is uncertain. The attorney may be particularly tempted to "take a flier" if the contingent fee resulting from a potential "blockbuster" recovery would substantially exceed the fee recoverable from a settlement which compromises the matter of liability.

Section 6146's Diversion Of Money To The Injured Patient Is Most Probably At The Expense Of Referring Attorneys, Which Is Sound Public Policy.

In "California's Medical Malpractice Crisis",[1] then-Assemblyman Keene, MICRA's principal author, noted that 46% of the premium dollar was associated with legal expenses, 20% was attributable to administrative costs, and "only 34%, at most of the premium dollar was received by the plaintiff as direct compensation for injuries suffered". One of MICRA's purposes, and particularly the purpose of § 6146, was to transfer some portion of the amount being spent on legal expenses to the injured patient. The thrust of appellants' main argument is that the limit on attorneys fees may deny patients access to counsel, on the supposition that personal injury lawyers no longer will accept malpractice cases because the legislature has limited their fees. There is no evidence

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[1] Keene, California's Medical Malpractice Crisis," *A Legislator's Guide To the Medical Malpractice Issue* (1976) Health Policy Center, Georgetown University and the National Conference of State Legislators.

in the record supporting this contention. It is controverted by facts in this case, where counsel was engaged without binding agreement and with full knowledge of § 6146, in a matter in which the court would have to approve the fee. However, it is not true that § 6146 requires a reduction in the compensation received by the attorney who handles a medical malpractice case. This is because California is one of the few jurisdictions which permits the payment of "straight" referral fees (the others are Massachusetts, Maine, and Texas). The discussion titled "*Referral Fees: Everybody does it, but is it O.K.?*" in ABA Journal, February, 1985, p. 40, includes criticism of the straight referral fee by the Chairman of the ABA Special Committee on Implementation of the Model Rules of Professional Conduct. The counter argument advanced against the ABA approach (American Bar Association Code of Professional Responsibility Disciplinary Rule 2-107) is that it is unenforceable and sure to be ignored. California, in fact, abandoned the ABA approach for this reason in 1979. In *Moran v. Harris* (1982) 131 Cal.App.3d 913, 182 Cal.Rptr. 519, the court grapples with California's attitude toward the referral fee, including the 1979 change. *Moran,* interestingly, also involved a fee attributable to the settlement of a minor's claim in a medical malpractice action, before MICRA. Concluding that "straight" referral fees were prohibited only between November 1972 and January 1, 1979, the court observes (921):

> The practice of forwarding fees among lawyers, part of our legal culture (see *Turner v. Donovan* (1935) 3 Cal.App.2d 485, 486-478 [39 P.2d 858]), remains with us even though the detrimental effect upon the client appears obvious. 'In an area where recovery in tort is founded primarily upon socialization of the loss occasioned by injury to person and property [citation], the society which bears that loss must be protected against arrangements which prevent the recovery from reaching the party injured, reduced only by necessary legal fees and other expenses of litigation. The pure referral fee, which compensates one lawyer with a percentage of a contingent fee for doing nothing more than obtaining the signature of a client upon a retainer agreement while the lawyer to whom the case is referred performs the work, is far from necessary to the injured person's recovery. To the extent that

the referral fee is paid for that purpose, loss has not been socialized. Rather, the obtaining of business by a lawyer who, by his own motion, has conceded his inability to handle it has been subsidized.' (*Dunne & Gaston v. Keltner* (1975) 50 Cal.App.3d 560, 566-567 [123 Cal.Rptr. 430] (conc. opn. of Thompson, J.).) The honoring of a referral fee is even more puzzling where the referring attorney is merely heeding the Rules of Professional Conduct in rejecting a case which he does not have the requisite skill or experience to handle competently. (See rule 6-101; *Horne v. Peckham* (1979) 97 Cal.App.3d 404, 414-415 [158 Cal.Rptr. 714]; see also *Lewis v. State Bar* (1981) 28 Cal.3d 683, 689-691 [170 Cal.Rptr. 634, 621 P.2d 258] (conc. opn. of Bird, C.J.).)

Regardless of the logic of this argument, there is another point of view. If the ultimate goal is to assure the best possible representation for a client, a forwarding fee is an economic incentive to less capable lawyers to seek out experienced specialists to handle a case. Thus, with marketplace forces at work, the specialist develops a continuing source of business, the client is benefited and the conscientious, but less experienced lawyer is subsidized to competently handle the cases he retains and to assure his continued search for referral of complex cases to the best lawyers in particular fields. (See discussion in Morgan & Rotunda, Problems and Materials on Professional Responsibility (2d ed. 1981) pp. 261-263.)

Whether one argument is better than the other is unimportant. What is important is to recognize there are differing points of view on this subject and those points of view may well have influenced the Legislature, the Supreme Court and the State Bar to refrain from prohibiting referral fee contracts prior to 1972. Presumably, these institutions, each structurally geared to respond to its constituents or the public, acted in response to articulated perceptions.

Perhaps sadly but certainly realistically, California agrees with the author of the counter-argument in the ABA Journal article, *supra*. Prohibiting payment of referral fees doesn't work. "Straight" referral fees apparently will be paid so long as the pot

of money available for the attorneys is so large as to warrant sharing with counsel who is not competent to represent the injured patient. Section 6146 provides reasonable compensation to the attorney who is able to represent that client. It will probably affect marketplace forces, a salutory result. Unless the court is prepared to view the plaintiff's bar in the worst possible light, there is no reason to assume that injured patients will not be able to secure representation if referring attorneys who do no work no longer share to the same degree in monies paid to compensate the patient. More likely, referral will be made on the same basis as occurs routinely in medical practice, where referrals are made to appropriate specialists without expectation or acceptance of referral fees. Recoveries by clients will be significantly increased without equivalent reduction in the income of the attorneys who actually handle their cases.

Dietz, Baird & Berul addressed referral fees in their study "The Medical Malpractice Legal System", contained in the Appendix to the Report of the Secretary's Commission on Medical Malpractice, DHEW, January 16, 1973, p. 87, 115. In their study, they surveyed attorneys with a significant practice in the representation of plaintiffs in medical malpractice cases.

During the period January 1, 1970 through September, 1972 these attorneys received a mean hourly fee of $84, which was reduced to $63 when referring attorneys were paid a one-third referral fee. Assuming that counsel in the case before this court paid a similar referral fee, the following arithmetic has some pertinence:

Fee sought by appellants' attorney	$120,810
Less 33% referral fee	$ 40,270
Balance to attorney.....	$ 80,530
Section 6146 Fee	$ 90,794

Appellants' effort to characterize § 6146 as a restriction upon injured patients who are litigants disguises an obdurate insistence that these attorneys cannot be regulated in matters affecting their fees, even where it is clear that such regulation may benefit those injured patients. Section 6146 may indeed require changes in the approach previously taken by the plaintiffs' bar toward the division of settlements and awards. The fact that some patients will

keep a larger share is likely to produce a change in referral fee practices. Section 6146 has changed what *Moran*, *supra*, describes as the "commercial milieu" of the practice. However, the elimination of payments to attorneys who do no work does not seem vulnerable to the constitutional attacks asserted here.

Defense attorneys are certainly not given any undue advantage by the application of § 6146. These attorneys, incidentally, are compensated at a significantly lower rate than the plaintiffs' lawyers surveyed, even taking into account the time plaintiffs' attorneys spend on cases which are lost. The study by Dietz et al., *supra*, found a mean hourly fee of $47 and a median fee of $50 paid to defense attorneys in medical malpractice cases, compared to the $63 mean effective hourly fee received by plaintiffs' attorneys after reduction for referral fees paid and taking into account their "losers" as well as their "winners". In large part, this is because insurance company claims managers provide an effective restraint on the amount defense attorneys may charge, and the services which defense attorneys may provide. If the claims manager is tempted to authorize tactics which are designed to wear down plaintiffs' counsel, albeit at some expense to the insurer, the penalties attached to such a practice are so severe as to dispel the temptation. The fact that counsel are subject to sanctions and professional discipline (California Rules of Professional Conduct 2-110) is an obvious deterrent, but the possibility that the carrier allowing such a practice will be liable to the plaintiff for damages, including punitive damages for bad faith or for engaging in an unfair business practice (Insurance Code § 790.03) should be more intimidating.*

CONCLUSION

Appellants present their appeal in "patients' rights" language, arguing that the young Roa was injured because his attorney could not receive more of the child's settlement. The facts of the

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* The California State Bar is already moving to eliminate abuses in discovery. The State Bar's Commission on Discovery is proposing major limitations and reforms as the subject of legislation next year: Los Angeles Daily Journal, August 28, 1985, p.1.

case, and the amount of money which was paid to that attorney, weigh heavily against this contention. The fact is that the real parties in interest are the attorneys who want larger fees than those allowed by § 6146. The threatened refusal to abandon these cases in favor of more lucrative work is unsupported by any facts, or even by realistic expectation. That has not been the case in ten years since the enactment of § 6146. Attorneys handling these cases need not receive less. They are unlikely to pay the referral fees which have been paid in the past, in these new economic circumstances. The relationship of referral fees to the application of § 6146 should not be ignored, because it further demonstrates that § 6146 involves the regulation of the practice of law. Appellant's claim is that their practice, and particularly their fees, cannot be regulated. The arguments which are made for this proposition, in the guise of arguments for the patient, have no substance.

The judgment of the California Supreme Court should be summarily affirmed, or, alternatively, the appeal should be dismissed.

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Respectfully submitted,

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